


**ONTARIO PUBLIC SERVICE
LABOUR RELATIONS TRIBUNAL
DECISIONS**

TRIBUNAL DECISIONS

1980 - 1983



Digitized by the Internet Archive
in 2025 with funding from
Ontario Council of University Libraries

https://archive.org/details/ontariopublicser00unse_0

ONTARIO PUBLIC SERVICE LABOUR RELATIONS TRIBUNAL DECISIONS

1980 - 1983

File No.	Date	Type and Disposition	Indexed
T/0002/80	Apr. --/80	Religious Objection; Dismissed	Yes
T/0005/80	May 13/80	Religious Objection; Allowed	No
T/0015/80	May 13/80	Religious Objection; Allowed	No
T/0020/80	Sept. 15/80	Religious Objection; Allowed	No
T/0021/80-1	Mar. 18/81	Certification; Preliminary	Yes
T/0021/80-2	Sept. 23/81	Employee Status; Allowed	Yes
T/0022/80	Oct. 16/80	Religious Objection; Allowed	No
T/0023/80	Nov. 28/80	Religious Objection; Allowed	No
T/0025/80	Apr. 10/81	Religious Objection; Allowed	Yes
T/0026/80	Jan. 22/81	Religious Objection; Allowed	No

File No.	Date	Type and Disposition	Indexed
T/0027/80	Feb. 20/81	Religious Objection; Settled	No
T/0028/80	Nov. 28/80	Religious Objection; Allowed	No
T/0030/80	Feb. 27/81	Religious Objection; Allowed	No
T/0031/80	Feb. 12/81	Religious Objection; Allowed	Yes
T/0035/80	Dec. 19/80	Religious Objection; Allowed	No
T/0036/80	Dec. 19/80	Religious Objection; Allowed	No
T/0037/80	Dec. 19/80	Religious Objection; Allowed	No
T/0039/80	Feb. 13/81	Religious Objection; Dismissed	No
T/0042/80	Feb. 2/81	Religious Objection Ruling	Yes
T/0043/80	Mar. 9/81	Certification; Allowed	No

File No.	Date	Type and Disposition	Indexed
T/0052/80	Oct. 28/81	Duty of Fair Representation; Dismissed	Yes
T/0004/81	Oct. 19/82	Duty of Fair Representation; Dismissed	No
T/0008/81	Nov. 20/81	Employee Status; Allowed	Yes
T/0014/81	Oct. 14/82	Adjourned Sine Die	No
T/0019/81	Jan. 24/83	Bargaining Authority; Dismissed	Yes
T/0026/81	undated	Religious Objection; Allowed	No
T/0028/81	Jan. 24/83	Bargaining Authority; Dismissed	Yes
T/0030/81	Mar. 2/82	Religious Objection; Allowed	No
T/0031/81	Apr. 6/83	Employee Status; Dismissed	Yes
T/0032/81-1	May 17/82	Bargaining Authority Ruling	Yes
T/0032/81-2	May 3/82	Order	No
T/0032/81-3	May 27/82	Interim	No

File No.	Date	Type and Disposition	Indexed
T/0032/81-4	July 28/82	Further Ruling	Yes
T/0032/81-5	Nov. 16/83	Reconsideration	Yes
T/0003/82 - see T/0004/81			
T/0019/82	Nov. 16/82	Employee Status; Allowed	No
T/0022/82	Apr. 26/88	Settled	No
T/0032/82	Apr. 7/83	Religious Objection; Allowed	No
T/0005/83	Feb. 3/84	Employee Status; Allowed	Yes
T/0008/83	Feb. 17/84	Duty of Fair Repre- sentation; Dismissed	Yes
T/0014/83-1	Jan. 23/84	Termination; Vote Ordered	Yes
T/0014/83-2	Apr. 29/85	Dismissed	No
T/0017/83	Sept. 10/85	Unfair Labour Practice; Dismissed	Yes
T/0023/83	Aug. 9/84	Employee Status; Dismissed	Yes

(DRAFT)

ONTARIO PUBLIC SERVICE LABOUR RELATIONS TRIBUNAL

T/2/80

BETWEEN: Joyce Pauline Tremlett

Applicant

- and -

BEFORE: Ontario Public Service Employees Union
(Ministry of Correctional Services)
Owen B. Shime, Q.C., Chairman
and Tribunal Members R. P. Riggin
and Dr. C. Jecchinis

Respondent

APPEARANCES AT THE HEARING:

Joyce Pauline Tremlett on her own behalf
G. Richards for the Union

DATE OF HEARING: March 3rd, 1980

DECISION OF THE TRIBUNAL

This is an application pursuant to Section 15 of The Crown Employees Collective Bargaining Act 1972 wherein the applicant objects to the payment of union dues because of her religious convictions.

There is no doubt that the applicant is a religious person with sincerely held religious beliefs. However the applicant was very honest with this Tribunal and admitted that the object of her application was to divert her union dues for religious purposes. She admitted that she does not object to paying dues or contributions to a union because of her religious convictions or belief but simply prefers that her dues be used instead for religious purposes.

While the applicant's motives may be commendable, the Tribunal cannot ignore its statutory obligation to satisfy itself that the applicant objects to paying Union dues because of her religious convictions. The applicant admitted that she has no objection to Unions or to paying Union dues but she simply prefers to have her Union dues diverted for a purpose that she feels is more worthwhile.

Accordingly in these particular circumstances and for the reasons given in Van Harten v. OPSEU, July 5th, 1976, unreported, the application is dismissed.

Dated at Toronto this

day of April 1980.

ONTARIO PUBLIC SERVICE LABOUR RELATIONS TRIBUNAL

T/5/80

Between: Joyce Shakespeare

and Ontario Public Service Employees Union

Before: O. B. Shime, Q.C. Chairman
P. Riffin and J. Sack, Members

Appearances at the Hearing: The applicant in person and
Ms. M. Mercer De Santis for the
Respondent's Union

Decision of the Tribunal

In this application pursuant to Section 15(2) of The Crown Employees
Collective Bargaining Act, 1972, the applicant objects to paying
dues or contributions to an employee organization because of her
religious convictions.

Having regard to the evidence and submissions of the parties and for
the reasons given in Van Harten v. O.P.S.E.U., July 5th, 1976, unreported,
it is our view that the order should be granted. Accordingly, we order
that the provisions of the collective agreement do not apply to the
applicant and she is not required to pay dues or contributions to OPSEU
and that the amounts equivalent thereto are to be remitted by the
respondent employer to a charitable organization mutually agreed upon
by the applicant and OPSEU. In the event they are unable to agree on
the charitable organization the Tribunal retains jurisdiction to designate
the recipient charitable organization. If the parties are unable to
agree then each should inform the Tribunal in writing and include therein

in writing and include therein any representations as to the charitable organization to be designated by the Tribunal.

"O. B. Shime", Q.C.
for the Tribunal

Dated at Toronto
this 13th day of May 1980

bq

ONTARIO PUBLIC SERVICE LABOUR RELATIONS TRIBUNAL

T/15/80

Between: Jytte S. Cooper

and Ontario Public Service Employees Union

Before: O. B. Shime, Q.C. Chairman
P. Riggan and J. Sack, Members

Appearances at the Hearing: The applicant in person and Ms. M. Mercer
De Santis for the Respondent's Union

Decision of the Tribunal:

In this application pursuant to Section 15(2) of The Crown Employees Collective Bargaining Act, 1972, the applicant objects to paying dues or contributions to an employee organization because of her religious convictions.

Having regard to the evidence and submissions of the parties and for the reasons given in Van Harten v. O.P.S.E.U., July 5th, 1976, unreported, it is our view that the order should be granted.

Accordingly, we order that the provisions of the collective agreement do not apply to the applicant and she is not required to pay dues or contributions to OPSEU and that the amounts equivalent thereto are to be remitted by the respondent employer to a charitable organization mutually agreed upon by the applicant and OPSEU. In the event they are unable to agree on the charitable organization the Tribunal retains jurisdiction to designate the recipient charitable organization. If the parties are unable to agree then each should inform the Tribunal

any representations as to the charitable organization to be designated by
by the Tribunal.

"O. B. Shime"
for the Tribunal

Dated at Toronto
this 13th day of May 1980

bq



ONTARIO PUBLIC SERVICE

LABOUR
RELATIONS
TRIBUNAL

180 DUNDAS STREET WEST, TORONTO, ONTARIO. M5G 1Z8 - SUITE 2100

TELEPHONE: 416/598-0688

ONTARIO PUBLIC SERVICE LABOUR RELATIONS TRIBUNAL

File T/20/80

BETWEEN:

Ralph Owen Lawrenson

Applicant

- and

Ontario Public Service Employees Union

Respondent

BEFORE:

Owen B. Shime, Q.C., Chairman, and
Tribunal Members, R.P. Riggan and J. Sack

APPEARANCE AT THE HEARING: The Applicant, in person, and
Lillian Stevens for the Respondent

DATE OF HEARING: September 12, 1980

DECISION OF THE TRIBUNAL:

This is an application pursuant to Section 15 of The Crown Employees Collective Bargaining Act wherein the applicant objects to the payment of union dues because of his religious convictions.

Having regard to the evidence and to the submissions of the parties and for the reasons given in Van Harten v. OPSEU, July 5th, 1976 unreported, it is our view that the order should be granted. Accordingly, we order that the provisions of the Collective Agreement pertaining to the payment of dues or contributions to the respondent's employee organization do not apply to the applicant and he is not required to pay dues or contributions to the Ontario Public Service Employees Union and that the amounts equivalent thereto are to be remitted by the employer to a charitable organization.

However, having regard to the agreement of the parties, the Tribunal hereby designates The Hospital for Sick Children (0003160-10-13), 555 University Avenue, Toronto, Ontario, to be the recipient of the equivalent of dues or contributions to Ontario Public Service Employees Union.

Dated at Toronto, Ontario, this 15th day of September 1980.

"O.B. Shime"
for the Tribunal

ONTARIO PUBLIC SERVICE LABOUR RELATIONS TRIBUNAL

T/21/80

BETWEEN: Ontario Public Service Employees Union Applicant

- And -

The Crown in Right of Ontario Respondent

- And -

Canadian Union of Public Employees
Local 767 Intervener

RE: Metropolitan Housing Authority

BEFORE: O. B. Shime, Q.C., Chairman
Dr. C. Jecchinis and Mr. J. H. McGivney,
Tribunal Members

APPEARANCES AT THE HEARING: S. Goudge, for the Applicant
A. Tarasuk, for the Respondent
M. Hiki, for the Intervener

DATE OF HEARING: September 26, 1980

This is an application for representation rights
for

"all office, clerical and professional Crown Employees of the Respondent in the Metro Housing Branch of Ontario Housing Corporation, in the Municipality of Metropolitan Toronto, save and except Supervisors, Property Managers II, Maintenance Supervisors II, and persons above such ranks and persons covered by subsisting collective agreements".

The intervener submits that the bargaining unit proposed by the applicant is inappropriate and proposes alternate descriptions of bargaining units which it claims are appropriate. These descriptions are as follows:

a) "All Crown Employees of the Respondent in the Metro Housing Branch of the Ontario Housing Corporation in the Municipality of Metropolitan Toronto save and except those persons who are not employees within the meaning of clause (g) of subsection (1) of the Crown Employees Collective Bargaining Act or

b) All Crown Employees of the Ontario Housing Corporation and all housing authorities in the Province of Ontario save and except those persons who are not employees within the meaning of clause (g) of subsection (1) Section (1) of the Crown Employees Collective Bargaining Act, 1972, as amended."

The employer does not take a position in the contest between the two unions. It has filed an organizational chart which reveals that the Ontario Housing Corporation has a housing operation for Ontario managed by a Director for Ontario and a separate housing operation for Metropolitan Toronto managed by a Director for Metro. The intervener is the bargaining agent for all employees of the respondent employer in Ontario as well as for all maintenance employees in Metro. The applicant holds bargaining rights for 70 office employees in Metro and seeks to represent the remaining office employees.

The intervener submits that it is open to the Tribunal to determine the appropriate bargaining unit pursuant to Section 3 of the Crown Employees Collective Bargaining Act. That section is as follows:

Section 3. - (1) Upon an application for representation rights, the Tribunal shall, subject to subsection 2, determine the unit of employees that is appropriate for collective bargaining purposes under this Act.

(2) The bargaining units designated in the regulations are appropriate units for collective bargaining purposes under this Act. 1972, c. 67, s. 3.

Regulation O. Reg. 577/72 - Section 10 is also relevant.

Section 10. All persons employed in the work of Ontario Housing Corporation within the Municipality of Metropolitan Toronto other than,

- (a) foremen;
- (b) office staff;
- (c) persons appointed under The Public Service Act; and
- (d) persons in the temporary service class who are not members of Local 767 of the Canadian Union of Public Employees by reason of their membership in another organization,

are designated as a unit of employees that is an appropriate bargaining unit for collective bargaining purposes, and Local 767 of the Canadian Union of Public Employees is designated as the employee organization that shall have representation rights in relation to such bargaining unit, upon the day the Act comes into force. O. Reg. 577/72, s. 10.

The intervener, in effect, maintains that the Tribunal's right to determine the appropriate bargaining unit overrides the regulations which have been enacted, or, to put it another way, the Tribunal has a wide and unfettered discretion to determine bargaining units. Also the intervener suggests that the regulation was only applicable upon the day the Act came into force and was "introduced for the purpose of facilitating an orderly functioning of the Act and as a protection of the well established existing bargaining relationship".

The applicant submits that the Regulations specifically define the bargaining unit and that neither of the bargaining units proposed by the intervener, as a matter of law may be found to be appropriate. The applicant argues that if the bargaining units proposed by the intervener were found to be appropriate it would have the effect of doing away with the separate bargaining unit provided for "outside" employees of the respondent and would effectively wipe out Section 10 of Ontario Regulation 577/72. The applicant further submits that the phrase "subject to subsection 2" in Section 3(1) is a clear constraint on the Tribunal's jurisdiction to determine appropriate bargaining units.

And, finally, the applicant submits that since the intervener does not represent employees in the proposed bargaining unit that it ought to have no standing in this application.

At first blush the argument advanced by the applicant seemed to be compelling but upon reflection we are not disposed to find that the positions advanced by the two contending unions are mutually exclusive. Certainly the units proposed by the intervener would normally considered to be appropriate. There is no situation that this Tribunal is aware of where an "all employee" bargaining unit has been found to be inappropriate. Indeed an all employee bargaining unit may be the most appropriate unit. In Ontario Public Service Employees Union v The Crown in Right of Ontario (Re Addiction Research Foundation) unreported, November 27, 1978 this Tribunal stated:

"These considerations are important in determining the appropriate bargaining unit. Thus in deciding which unit is appropriate a Labour Relations Board or Tribunal must consider the right of the employees to organize, the viability or ability of a proposed unit to bargain, and whether the proposed units are conducive to industrial peace and stability.

It has generally been recognized that most employment situations lend themselves to more than one appropriate bargaining unit. Generally the largest or most comprehensive unit will be the best for collective bargaining and for industrial peace. The most comprehensive bargaining unit represented by an experienced trade union is generally able to reflect the needs of the diverse employee groups within the unit. Also such a unit is of greater benefit to the employees because their mobility is increased; lateral transfers, movements into different areas and greater opportunities for promotion are benefits which enure to employees in larger units. Further time spent in negotiations is minimized when one group rather than several negotiate. This affects the costs both to the employer and the union.

One of the more important benefits to be found in the larger bargaining units is the avoidance of unduly small and fragmented units which result in whipsawing, jurisdictional disputes and additional costs. Thus whipsawing occurs in situations where representatives of one or more units compete with each other in an attempt to negotiate greater gains from the employer. Also where there are many groupings within a single employer organization lines of jurisdiction or demarcation must be drawn in order to distinguish the work of one bargaining unit from another. The rigidity that flows from this situation is harmful to the employer who does not enjoy the flexibility of assigning work at will and is harmful to the employees who cannot transfer across jurisdictional lines

without losing benefits such as seniority and perhaps distinctive fringe benefits. This confinement creates a stagnation and lack of mobility in the work force.

It also goes without saying that fragmentation also is costly to the parties. Not only are they faced with separate negotiations which are time consuming but the servicing of separate bargaining units by different persons is also more costly to the employees at large than those situations where they are serviced by a single union.

And finally, where there are multiple bargaining units, each may choose to strike at different times thereby seriously affecting the whole enterprise including the public and the employees some of whom may be affected and out of work as the result of a strike caused by other bargaining units of the same employer. Even if the final solution to an impasse is third party intervention such as arbitration, which is the rule in the Ontario Public Service, the enterprise as well as the employees may be affected as the result of separate arbitration awards which may not be consistent. For example, in the situation we are faced with, if there were multiple bargaining units in the individual centres each of which went to a different arbitration board there could be different awards which would create discontent and dissatisfaction among those employees who perceived that they were shortchanged in the arbitration process and this discontent or dissatisfaction might affect the service provided by these employees.

In that case the Tribunal also observed "that public sector units should not be unduly fragmented because of (a) the administrative advantage of concentrating the negotiating efforts of the public employer with only one spokesman for the employees, and (b) the desirability of achieving standard terms and conditions of employment for all employees of a public employer throughout the

province". Further the Tribunal felt that since the parties were subject to interest arbitration as the dispute resolving mechanism, "the larger bargaining unit minimized the potential impact of a number of arbitration awards on employees performing the same service".

While recognizing that an all employee unit may be the optimal unit it does not follow that a lesser unit is inappropriate. A particular organization may lend itself to more than one bargaining unit. The essence of appropriateness is the ability to carry on a viable and meaningful collective bargaining relationship and certainly the bargaining unit proposed by the applicant falls within the type of unit that is common in the private sector in situations which are parallel or closely analogous to the situation with this employer. In Amalgamated Transit Union v The Crown in Right of Ontario (Re Toronto Area Transit Operating Authority) unreported, June 23, 1980, this Tribunal while indicating the preferability of larger bargaining units found that a provincial organization operating in a more limited or narrow geographic area than the province, i.e. Metropolitan Toronto and its surroundings was the type of operation that lent "itself to the more classical definition of bargaining units i.e. a white collar unit and a blue collar unit." The building maintenance employees were found to have a community of interest with employees who maintained vehicles and were placed in a "blue collar" bargaining unit which in effect left the office and technical employees as a group which were capable of being organized into a separate and distinct bargaining unit. On the surface it appears to be a situation which is indistinguishable

from the instant situation but it is not necessary to finally decide that issue.

Assuming, but without finally deciding, that the units proposed by the applicant and the intervener are prima facie appropriate we now turn to the impact of the legislation and particularly the regulations on this Tribunal's ability to make a bargaining unit determination. Does the regulation fetter our discretion?

In our view the regulations which established bargaining units including Section 10 appear to be transitional regulations which maintained traditional bargaining units and preserved bargaining rights for various unions when the Act came into force. These maintenance provisions avoided the disruption and instability that might have occurred had existing bargaining units and bargaining representatives not been maintained. However, we do not think that the designated units are limited to the day the Act came into force; the designated unit was not only preserved on that day but continued to the present. The net result is that the combined effect of Section 3(2) and the regulations as a matter of law preserved the designated unit and as a matter of fact created a viable bargaining relationship which continued for some years so that presently we are compelled to conclude that the designated unit is appropriate.

It is also our view that the phrase "upon the day the Act comes into force" in the regulation qualifies the representation rights but not the designated unit. We do not think that those who framed the regulation intended that the bargaining unit and the re-

presentation rights should expire on the day that the Act came into force. Nor is it our view that it was intended that the representation rights continue in perpetuity. The phrase "upon the day the Act comes into force" preserves the representation rights of the intervenor in the transitional period and those rights are then continued subject to the provisions of the Act.

Moreover, the person who drafted the regulation must have considered traditional bargaining units; while the regulation does not in precise terms describe the bargaining unit in the same fashion that a Labour Relations Tribunal might describe it, the description is sufficiently close that the regulation may usefully be compared to the traditional bargaining unit descriptions. More particularly, the description of who is in the unit and who is outside the unit leaves office staff excluded in a manner which suggests that these employees may be encompassed in a separate bargaining unit in much the same way as office staff who are excluded from a plant or production unit where such a unit is found to be appropriate.


In sum while we agree that our determination under Section 3(1) is subject to subsection 2, it is our view that in these particular circumstances there is no inherent conflict between an unfettered discretion and what this Tribunal might determine to be appropriate if Section 3(1) and Regulation 10 were not within the Act.

The only possible conflict that might occur would be if we found an all employee unit to be appropriate because that appears to fly in the face of the designated unit in the regulations.

However, in our view, the designated unit is the minimum bargaining unit that this Tribunal might find appropriate. Certainly, if there was an application for representation rights, we would be bound to consider the designated unit as appropriate. But that does not mean that the designated unit could not be included in a greater and more comprehensive unit. As we have indicated, many organizational situations lend themselves to more than one bargaining unit and, in our view, merely because the regulation has designated one bargaining unit as being appropriate does not mean that all other potential bargaining units are inappropriate or that the designated unit could not be included in a more comprehensive unit. This does not eliminate the effect of the regulation, but merely preserves it in a larger context.

In the result, we do not find that this is an either/or situation which requires us to adopt the position of the applicant and reject the position of the intervener or vice versa, and accordingly, the Registrar is directed to list this matter for continuation of hearing.

Dated at Toronto this 18th day of March 1981.



O. B. Shime, for the Tribunal

ONTARIO PUBLIC SERVICE LABOUR RELATIONS TRIBUNAL

T/21/80

BETWEEN: Ontario Public Service Employees Union
Applicant

- And -

The Crown in Right of Ontario
(Metro Housing Branch of
Ontario Housing Corporation) Respondent

- And -

Canadian Union of Public Employees
Local 767 Intervener

BEFORE: O. B. Shime, Q.C., Chairman and
J. H. McGivney and C. Jecchinis,
Tribunal Members

APPEARANCES AT THE HEARING: Mr. A. P. Tarasuk, for the
Employer and Mr. I. Roland,
for the Union

DATE OF HEARING: July 20 & 21, 1981 and September 18, 1981

DECISION OF THE TRIBUNAL

In this application for representation rights,
the parties could not agree as to whether certain persons
who were classified as Assistant Project Managers were
employed in a managerial or confidential capacity within
the meaning of Section 1(1)(m) of the *Crown Employees*

Collective Bargaining Act. Accordingly, the Tribunal heard evidence concerning the duties and responsibilities of Mrs. Denyse Ashford, who was at all relevant times, an Assistant Project Manager. It was agreed by both parties that Mrs. Ashford's evidence would be representative of the duties and responsibilities of the Assistant Project Manager and would be determinative of the status of the other persons similarly classified.

The Employer submitted that Mrs. Ashford was employed in a managerial capacity within the meaning of Section 1(m)(ii), (iii), and (viii) of the Act, while the Union submitted that Mrs. Ashford was at all relevant times an employee and that her duties and responsibilities did not fall within those provisions relied upon by the Employer.

Having regard to the evidence and the submissions of the parties, the Tribunal is unanimously of the view that Mrs. Ashford does not fall within the meaning of Section 1(m)(ii) of the Act so as to cause her to be a person employed in a managerial capacity; while she did attend meetings concerning the administration of programs, the evidence does not demonstrate that she was involved "in the formulation of organization objectives and policy". See *OPSEU vs. The Crown in Right of Ontario, re Welton*, April 6, 1977, unreported.

The Tribunal is also unanimously of the view that Mrs. Ashford does not fall within the provisions of Section 1(m)(iii) of the Act so as to cause her to be employed in a managerial capacity. At the Project where Mrs. Ashford was employed, there were approximately 20 employees in a bargaining unit represented by the Canadian Union of Public Employees, who from time to time required supervision in the performance of their maintenance duties. This maintenance staff was supervised directly by a Senior Maintenance Supervisor and an Assistant Maintenance Supervisor. In addition, there was a Project Manager on site who had the overall responsibility for the Project. Mrs. Ashford's major function was to perform administrative duties and she did from time to time supervise employees. However, she only "supervised" those employees when the other three managerial employees happened to be absent at the same time.

After considering the evidence, it is our opinion that Mrs. Ashford did not have primary responsibility for supervising the employees and would only supervise them on a sporadic basis in circumstances where the other three managerial persons happened to be absent. Quite obviously this did not occur on a frequent basis. It should be remembered that the maintenance staff performs basic routine duties for the most part so that, the requirement for meaningful supervision by Mrs. Ashford was limited not only in time but also in scope. In these circumstances,

we are unable to conclude that Mrs. Ashford spent a "significant" portion of her time in the supervision of employees.

The majority of the Tribunal further determines that this is not a case, bearing in mind the ratio of the number of managerial persons to the number of maintenance staff and the availability of other managerial persons for supervision, to exercise our discretion within the meaning of Section 1(1)(m)(viii) of the Act so as to exclude Mrs. Ashford from the bargaining unit. Mr. McGivney is of the opinion that this is an appropriate case for discretion to be exercised so as to exclude Mrs. Ashford from the bargaining unit in view of her total duties and responsibilities.

In the result, it is determined that the Assistant Project Managers employed by the Respondent are persons who are not employed in a managerial capacity within the meaning of the Act and the Registrar is directed to place their ballots in the ballot box with those of other employees and to count the ballots.

DATED at Toronto this 23rd day of September, 1981.

O. B. Shime, Q.C.
Chairman, for the Tribunal

ONTARIO PUBLIC SERVICE LABOUR RELATIONS TRIBUNAL

T/22/80

BETWEEN: John G. Heyink

APPLICANT

- and -

ONTARIO PUBLIC SERVICE EMPLOYEES UNION

RESPONDENT

BEFORE: Owen B. Shime, Q.C., Chairman and Tribunal
Members J. McGivney and C. Jecchinis

APPEARANCES AT THE HEARING: G. Vanderzande for the Applicant
George Richards for the Respondent

DATE OF HEARING: September 26, 1980

DECISION OF THE TRIBUNAL

This is an application pursuant to Section 15 of The Crown Employees Collective Bargaining Act, 1972 wherein the applicant objects to the payment of union dues because of his religious convictions.

Having regard to the evidence and to the submissions of the parties and for reasons given in Van Harten v. OPSEU, July 5th, 1976 unreported, it is our view that the order should be granted. Accordingly, we order that the provisions of the collective agreement pertaining to the payment of dues or contributions to the respondent employee organization do not apply to the applicant and he is not required to pay dues or contributions to the Ontario Public Service Employees Union and that the amounts equivalent thereto are to be remitted by the employer to a charitable organization mutually agreed upon by the applicant and the Ontario Public Service Employees Union. In the event that they are unable to agree on the charitable organization the Tribunal retains jurisdiction to designate the charitable organization. If the parties are unable to

agree then each should inform the Tribunal in writing and include therein any representations as to the charitable organization to be designated by the Tribunal.

Dated at Toronto this 16th day of October 1980

"O. B. Shime"
for the Tribunal

ONTARIO PUBLIC SERVICE LABOUR RELATIONS TRIBUNAL

T/23/80

BETWEEN: A. Thonigs

Applicant

- and -

Ontario Public Service Employees Union

Respondent

BEFORE: Owen B. Shime, Q.C. Chairman and Tribunal
Members L. Binder and C. Jecchinis

APPEARANCES AT THE HEARING: Thonigs for the Applicant (herself)
M. Pratt for the Respondent

DATE OF HEARING: November 13, 1980

DECISION OF THE TRIBUNAL

This is an application pursuant to Section 15 of The Crown Employees Collective Bargaining Act, 1972 wherein the applicant objects to the payment of union dues because of her religious convictions.

Having regard to the evidence and to the submissions of the parties and for reasons given in Van Harten v. OPSEU, July 5th, 1976 unreported, it is our view that the order should be granted. Accordingly, we order that the provisions of the collective agreement pertaining to the payment of dues or contributions to the respondent employee organization do not apply to the applicant and she is not required to pay dues or contributions to the Ontario Public Service Employees Union and that the amounts equivalent thereto are to be remitted by the employer to a charitable organization

It the parties are unable to agree then each should inform the Tribunal in writing and include therein any representations as to the charitable organization to be designated by the Tribunal.

Dated at Toronto this 28th day of November, 1980

"O. B. Shime"
for the Tribunal

ONTARIO PUBLIC SERVICE LABOUR RELATIONS TRIBUNAL

T/25/80

BETWEEN: Mr. Benjamin Franklin Parr Applicant

- And -

Ontario Public Service Employees
Union Respondent

- And -

The Crown in Right of Ontario
Management Board of Cabinet Respondent

BEFORE: O. B. Shime, Q.C., Chairman and
C. Jecchinis and L. Binder, Tribunal Members

APPEARANCES AT THE HEARING: B. F. Parr on his own behalf;
M. Pratt for the Respondent Union

DATE OF HEARING: November 13, 1980

DECISION OF THE TRIBUNAL

This is an application pursuant to Section 15 of The Crown Employees Collective Bargaining Act, 1972 wherein the applicant requests an exemption from the payment of dues to the respondent union on the basis of his religious conviction or belief.

The applicant is a member of the United Church of Canada and is active in the church. He attends regularly, is a member of the Board of Elders and is a Sunday School teacher. We have no doubt that the applicant is religious and there is no question that he objects to paying dues or contributions to the respondent union. The difficulty in this case is in determining whether the applicant's objections to payment are related to his religious convictions or beliefs.

The testimony of the applicant indicated a strong objection to the union and its activities. Indeed, when compared to other applications that we have heard, there was a distinct secular tone to his objection. This Tribunal has been vigilant to ensure that applicants under Section 15 are not merely using the section to escape their obligations to the union, and to that end, it has required applicants to establish a relationship or nexus between their objection and their religious conviction or belief i.e. the objection must find its roots in the religious convictions or beliefs and must not be of a secular nature.

While there was a secular tone to the applicant's testimony he did attempt to relate his objection to his "personal faith and belief". Where an applicant testifies that his or her objection is rooted in a religious conviction or belief it is always difficult to probe that person's subjective position. There are really no objective standards against which we can test an applicant's personal and subjective views.

Thus while there were parts of the applicant's testimony which left us with some doubts, in the final analysis, we are unable to conclude that he is using the section as a vehicle to support personal views of a secular nature or as a ruse for avoiding the payment of union dues.

In the result, we order that the provisions of the collective agreement pertaining to the payment of dues or contributions to the respondent employee organization do not apply to the applicant and he is not required to pay dues or contributions to the respondent and that the amounts equivalent thereto are to be remitted by the employer to a charitable organization mutually agreed upon by the applicant and the respondent. In the event that they are unable to agree on the charitable organization the Tribunal retains jurisdiction to designate the charitable organization. If the parties are unable to agree then each should inform the Tribunal in writing and include therein any representations as to the charitable organization to be designated by the Tribunal.

Dated at Toronto this 10th day of April 1981.

O. B. Shime, for the Tribunal

ONTARIO PUBLIC SERVICE LABOUR RELATIONS TRIBUNAL

T/26/80

BETWEEN: Ms. Elouise Murray Applicant

- And -

Ontario Public Service Employees Union Respondent

BEFORE: O. B. Shime, Q.C., Chairman and
L. Binder and C. Jecchinis, Tribunal Members

APPEARANCES AT THE HEARING: G. Vanderzande for applicant
G. Richards for Respondent

DATE OF HEARING: January 20th, 1981

DECISION OF THE TRIBUNAL

This is an application pursuant to Section 15 of the Crown Employees Collective Bargaining Act, 1972 wherein the applicant objects to the payment of union dues because of her religious convictions.

Having regard to the evidence and to the submissions of the parties and for reasons given in Van Harten v. OPSEU, July 5th, 1976 unreported, it is our view that the order should be granted. Accordingly, we order that the provisions of the collective agreement pertaining to the payment of dues or contributions to the respondent employee organization do not apply to the applicant and she is not required to pay dues or contributions to the Ontario Public Service Employees Union and that the amounts equivalent thereto

are to be remitted by the employer to the Ontario Heart Foundation,
576 Church Street, Toronto, Ontario M4Y 2S1 (#0000182-11-13) as agreed
by the parties.

Dated at Toronto this 22nd day of January, 1981.

"O. B. Shime"
O. B. Shime, for the Tribunal

ONTARIO PUBLIC SERVICE LABOUR RELATIONS TRIBUNAL

T/27/80

Between: Ms. Marcelle Van Dyke

Applicant,

- and -

Ontario Public Service Employees Union

Respondent,

Termination of Proceedings

Having regard to the agreement between the parties that Ms. Marcelle Van Dyke be exempted from dues payment in contribution to an employee organization on the grounds of religious conviction or belief, and, that the parties have agreed that the appropriate charity, the United Fund, is to receive the equivalent of dues, the Tribunal hereby terminates the proceedings.

Dated the 20th day of February 1981 in the City of Toronto.

"O. B. Shime"
for the Tribunal

B.Q.

ONTARIO PUBLIC SERVICE LABOUR RELATIONS TRIBUNAL

T/28/80

BETWEEN: V. T. Jensen

Applicant

- and -

Ontario Public Service Employees Union

Respondent

BEFORE: Owen B. Shime, Q.C. Chairman and Tribunal
Members L. Binder and C. Jecchinis

APPEARANCES AT THE HEARING: V. T. Jensen (for himself)
M. Pratt for Respondent

DATE OF HEARING: November 13, 1980

DECISION OF THE TRIBUNAL

This is an application pursuant to Section 15 of The Crown Employees Collective Bargaining Act, 1972 wherein the applicant objects to the payment of union dues because of his religious convictions.

Having regard to the evidence and to the submissions of the parties and for reasons given in Van Harten v. OPSEU, July 5th, 1976 unreported, it is our view that the order should be granted. Accordingly, we order that the provisions of the collective agreement pertaining to the payment of dues or contributions to the respondent employee organization do not apply to the applicant and he is not required to pay dues or contributions to the Ontario Public Service Employees Union and that the amounts equivalent thereto are to be remitted by the employer to a charitable organization

If the parties are unable to agree then each should inform the Tribunal in writing and include therein any representations as to the charitable organization to be designated by the Tribunal.

Dated at Toronto this 28th day of November, 1980

"O. B. Shime"
for the Tribunal

ONTARIO PUBLIC SERVICE LABOUR RELATIONS TRIBUNAL

T/30/80

BETWEEN: Mr. Cornelius M. Penning Applicant
- And -
Ontario Public Service Employees Union Respondent
- And -
Crown in Right of Ontario
Ministry of Transportation and Communications Respondent

BEFORE: O. B. Shime, Q.C., Chairman and
C. Jecchinis and L. Binder, Tribunal Members

APPEARANCES AT THE HEARING: C. M. Penning on his own behalf;
M. Pratt for Respondent.

DATE OF HEARING: November 13, 1980

DECISION OF THE TRIBUNAL

This is an application pursuant to Section 15 of the Crown Employees Collective Bargaining Act, 1972 wherein the applicant requests an exemption from the payment of dues to the respondent union on the basis of his religious conviction or belief.

For the reasons given in Van Harten v. OPSEU et al (July 5th, 1976, unreported) and Ariaratnam v. OPSEU et al (February 12, 1981, unreported), the Tribunal determines that the

applicant because of his religious conviction or belief objects to paying dues or contributions to the respondent union.

Accordingly, we order that the provisions of the collective agreement pertaining to the payment of dues or contributions to the respondent employee organization do not apply to the applicant and he is not required to pay dues or contributions to the respondent and that the amounts equivalent thereto are to be remitted by the employer to a charitable organization mutually agreed upon by the applicant and the respondent. In the event that they are unable to agree on the charitable organization the Tribunal retains jurisdiction to designate the charitable organization. If the parties are unable to agree then each should inform the Tribunal in writing and include therein any representations as to the charitable organization to be designated by the Tribunal.

Dated at Toronto this 27th day of February 1981.

O. B. Shime, for the Tribunal

/lb

ONTARIO PUBLIC SERVICE LABOUR RELATIONS TRIBUNAL

T/31/80

BETWEEN: Kathiravet Pillai Ariaratnam Applicant

- And -

Ontario Public Service Employees
Union Respondent

- And -

Crown in Right of Ontario
Ministry of Health Respondent

BEFORE: O. B. Shime, Q.C., Chairman
C. Jecchinis and L. Binder, Tribunal Members

APPEARANCES AT THE HEARING: K. P. Ariaratnam on his own behalf;
M. Pratt for Respondent.

DATE OF HEARING: November 13, 1980

DECISION OF THE TRIBUNAL

This is an application pursuant to Section 15 of the Crown Employees Collective Bargaining Act, 1972 wherein the applicant requests an exemption from the payment of dues to the respondent union on the basis of his religious conviction or belief.

In an earlier decision this Tribunal indicated that it would consider an applicant's religious conviction from a subjective point of view and that there must be a "nexus" between a religious

conviction or belief and the objection to paying dues or contributions to an employee organization. Van Harten v. OPSEU et al (July 5th, 1976, unreported). In that decision the Tribunal also indicated that it was not prepared to question the logic of how an applicant arrived at his or her religious conviction. The Tribunal realizes that an applicant may arrive at his or her objection in a variety of ways.

There is no doubt that in this case that the applicant is sincere in his belief and that his objection to paying dues or contributions to the respondent employee organization is related to his religious convictions. The difficulty in this case is in establishing a "nexus" between his religious conviction and his objection. As indicated, we are not prepared to analyze the logic as to how the applicant has arrived at his particular religious conviction or belief, nor are we concerned with the logical analysis as to how the applicant relates his objection to payment of union dues.

It is the Tribunal's experience that many applicants find their objection in particular passages of the Bible. However, there are some cases where the applicant's whole existence is governed by his or her religious conviction or belief. Thus in some instances the objection is not grounded upon any particular biblical passage or any single part of an applicant's religion, but merely stems from the applicant's philosophical or religious way of life - the objection is only a part of a religious totality. In such case this Tribunal will honour an objection although it is not grounded on a specific or particular portion of the Bible where it

appears that the totality of the applicant's existence is governed by a religious conviction or belief and the objection is based on that religious conviction or belief or is part of his or her approach to life.

In considering the evidence and the submissions of the applicant, it is our belief that the applicant falls into that class of person. His daily existence is governed by sincerely held religious belief and as a part of that existence he objects to payment of union dues. These beliefs are sincerely held and his objection to paying dues is related to his religious conviction.

In the result, we order that the provisions of the collective agreement pertaining to the payment of dues or contributions to the respondent employee organization do not apply to the applicant and he is not required to pay dues or contributions to the respondent and that the amounts equivalent thereto are to be remitted by the employer to a charitable organization mutually agreed upon by the applicant and the respondent. In the event that they are unable to agree on the charitable organization the Tribunal retains jurisdiction to designate the charitable organization. If the parties are unable to agree then each should inform the Tribunal in writing and include therein any representations as to the charitable organization to be designated by the Tribunal.

Dated at Toronto this 12th day of February 1981.



O. B. Shime, for the Tribunal

T/35/80

BETWEEN: Theo Grootenboer

APPLICANT

- and -

ONTARIO PUBLIC SERVICE EMPLOYEES UNION

RESPONDENT

BEFORE: Owen B. Shime, Q.C., Chairman and Tribunal
Members R. P. Riggin and J. Sack

APPEARANCES AT THE HEARING: The Applicant, in person
Mr. George Richards, for the Union

DATE OF HEARING: December 12, 1980

DECISION OF THE TRIBUNAL

This is an application pursuant to Section 15 of *The Crown Employees Collective Bargaining Act, 1972* wherein the applicant objects to the payment of Union dues because of his religious convictions.

Having regard to the evidence and to the submissions of the parties and for the reasons given in *Van Harten v. OPSEU, July 5th, 1976 unreported*, it is our view that the order should be granted. Accordingly, we order that the provisions of the collective agreement pertaining to the payment of dues or contributions to the respondent employee organization do not apply to the applicant and he is not required to pay dues or contributions to OPSEU and that the amounts equivalent thereto are to be remitted by the respondent employer to a charitable organization mutually agreed upon by the applicant and OPSEU.

In the event the parties are unable to agree on the charitable

organization each should so inform the Tribunal in writing and include therein any representations as to the desired charitable organization to be designated by the Tribunal, in accordance with Section 15(2) of the Act.

Dated at Toronto this 19th day of December 1980

"O. B. Shime"
for the Tribunal

T/36/80

APPLICANT

BETWEEN: C. W. Vanvolkingburgh,

- and -

ONTARIO PUBLIC SERVICE EMPLOYEES UNION

RESPONDENT

BEFORE: Owen B. Shime, Q.C., Chairman and Tribunal
Members R. P. Riggin and J. Sack

APPEARANCES AT THE HEARING: The Applicant, in person
Mr. George Richards, for the Union

DATE OF HEARING: December 12, 1980

DECISION OF THE TRIBUNAL

This is an application pursuant to Section 15 of *The Crown Employees Collective Bargaining Act, 1972* wherein the applicant objects to the payment of Union dues because of his religious convictions.

Having regard to the evidence and to the submissions of the parties and for the reasons given in *Van Harten v. OPSEU*, July 5th, 1976 *unreported*, it is our view that the order should be granted. Accordingly, we order that the provisions of the collective agreement pertaining to the payment of dues or contributions to the respondent employee organization do not apply to the applicant and he is not required to pay dues or contributions to OPSEU and that the amounts equivalent thereto are to be remitted by the respondent employer to a charitable organization mutually agreed upon by the applicant and OPSEU.

In the event the parties are unable to agree on the charitable

organization each should so inform the Tribunal in writing and include therein any representations as to the desired charitable organization to be designated by the Tribunal, in accordance with Section 15(2) of the Act.

Dated at Toronto this 19th day of December 1980

"O. B. Shime"
for the Tribunal

T/37/80

BETWEEN: Laura C. V. Boles (Mrs.)

APPLICANT

- and -

ONTARIO PUBLIC SERVICE EMPLOYEES UNION

RESPONDENT

BEFORE: Owen B. Shime, Q.C., Chairman and Tribunal
Members R. P. Riggan and J. Sack

APPEARANCES AT THE HEARING: The Applicant, in person
Mr. George Richards, for the Union

DATE OF HEARING: December 12, 1980

DECISION OF THE TRIBUNAL

This is an application pursuant to Section 15 of *The Crown Employees Collective Bargaining Act, 1972* wherein the applicant objects to the payment of Union dues because of her religious convictions.

Having regard to the evidence and to the submissions of the parties and for the reasons given in *Van Harten v. OPSEU*, July 5th, 1976 *unreported*, it is our view that the order should be granted. Accordingly, we order that the provisions of the collective agreement pertaining to the payment of dues or contributions to the respondent employee organization do not apply to the applicant and she is not required to pay dues or contributions to OPSEU and that the amounts equivalent thereto are to be remitted by the respondent employer to a charitable organization mutually agreed upon by the applicant and OPSEU.

In view of the agreement between the parties as to the

charitable organization to be designated the recipient, the Tribunal so designates the United Way (Reg. No. 0008466-05-16), 15 King Street, Suite 101, P.O. Box 816, St. Catharines, Ontario L2R 6Y3.

Dated at Toronto this 19th day of December 1980

"O. B. Shime"
for the Tribunal

ONTARIO PUBLIC SERVICE LABOUR RELATIONS TRIBUNAL

T/39/80

BETWEEN: Mr. Charles W. Zess

Applicant

- And -

Ontario Public Service Employees Union

Respondent

BEFORE: O. B. Shime, Q.C., Chairman and
L. Binder and C. Jecchinis, Tribunal Members

APPEARANCES AT THE HEARING: Applicant on his own behalf;
G. Richards for Respondent.

DATE OF HEARING: January 21, 1981

DECISION OF THE TRIBUNAL

Having regard to the evidence and the submissions of the parties, the Tribunal determines that the applicant does not fall within the exemption contained in Section 15 of the Crown Employees Collective Bargaining Act.

Accordingly, the application is dismissed.

Dated at Toronto this 13th day of February, 1981.

O. B. Shime, for the Tribunal

ONTARIO PUBLIC SERVICE LABOUR RELATIONS TRIBUNAL

FILE #T/42/80

BETWEEN:

Mrs. Doris Knight

Applicant

- And -

Ontario Public Service Employees
Union

Respondent
Employee
Organization

BEFORE:

O. B. Shime, Q.C., Chairman and
L. Binder and C. Jecchinis, Tribunal Members

APPEARANCES AT THE HEARING:

The Applicant appeared in person and
G. Richards for the Employee
organization.

DATE OF HEARING:

January 20, 1981

DECISION OF THE TRIBUNAL

In a prior decision in this matter this Tribunal had ordered that the applicant because of her religious convictions or beliefs was not required to pay dues or contributions to OPSEU and that the amounts equivalent thereto were to be remitted to a charitable organizations mutually agreed upon by the applicant and OPSEU. In accordance with Section 15(2) of The Crown Employees Collective Bargaining Act the Tribunal retained jurisdiction to designate the appropriate charitable organization if the parties failed to reach an agreement.

The Tribunal has now been advised that the parties have been unable to reach an agreement.

After due consideration it is our view that we should designate a charitable organization located in the area where the applicant either resides or works. Accordingly we designate the Donors' Association of Owen Sound, P. O. Box 73 Owen Sound, Ontario (0225912-05-15) to be the recipient charitable organization of the amounts equivalent to dues in accordance with our decision dated January 22nd, 1981.

Dated at Toronto, Ontario this 2nd day of February, 1981.

"O. B. Shime"
For the Tribunal

/lb

Between: Amalgamated Transit Union, Local 1587 Applicant

- And -

The Crown in Right of Ontario
(Toronto Area Transit Operating
Authority) Respondent

Before: O. B. Shime, Q.C., Chairman and
J. Sack and P. Riffin, Board members

Determination

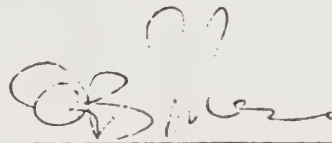
1. This is an application for certification. The Tribunal finds that the Applicant is an employee organization within the meaning of Section (1)(1)(h) of the Crown Employees Collective Bargaining Act.

2. Having regard to the agreement of the parties, the Tribunal determines that all employees of the respondent in the Province of Ontario, save and except supervisors and foremen, and persons above the rank of supervisor and foreman, office and technical staff and persons excluded by the Crown Employees Collective Bargaining Act, constitute a unit of employees that is appropriate for collective bargaining purposes pursuant to the Act.

3. On the taking of representation vote more than 50% of the ballots cast were in favour of the Applicant and accord-

ingly the Tribunal hereby grants representation rights to the Applicant as the bargaining agent of the employees in the afore-said bargaining unit.

Dated at Toronto, Ontario this 9th day of March 1981.

A handwritten signature in dark ink, appearing to read 'O.B. Shime', is written over a horizontal line.

O.B. Shime, for the Tribunal

/lb

BETWEEN: Mr. R. J. Heard Complainant

- And -

Ontario Public Service Employees
Union Respondent

BEFORE: O. B. Shime, Q.C., Chairman and
J. H. McGivney, Q.C. and
C. Jecchinis, Tribunal Members

APPEARANCES AT THE HEARING: Mr. R. J. Heard, on his
behalf and Mr. G. Richards,
on behalf of the Union

DATE OF HEARINGS: March 16, 1981 and September 21, 1981

DECISION OF THE TRIBUNAL

In this matter, the complainant alleges that, in essence, the Union is in breach of its duty of fair representation. Mr. Heard was an Ambulance Driver employed by the Ministry of Health and unfortunately, as a result of a heart attack, he was and continues to be disqualified from driving an ambulance, in accordance with the policies of the Ministry of Transportation and Communications. He has recuperated from his illness and desires to return to work. Currently, he is receiving long-term disability benefits.

Since early 1980, efforts have been made by both the Employer and the Union to provide Mr. Heard with employment. Letters have been sent to various Ministries and Mr. Heard has been interviewed for employment within the Government. He has also sought employment outside of the Government.

Suffice it to say that the Union has made efforts both in writing and verbally in an attempt to obtain another job for Mr. Heard.

It appears that the opportunity for employment for Mr. Heard is limited because of his medical condition and because of his limited education. Also since Mr. Heard lives in Whitby, he prefers to have another job within a 40-mile radius of Whitby and quite understandably does not wish to relocate his home in order to obtain alternate employment; this also imposes some limitations.

The issue in this case is whether the Union has acted "... in a manner that is arbitrary, discriminatory or in bad faith" within the meaning of the Act in representing Mr. Heard. Previous cases under this Section or similar legislation have indicated that the Union is not a guarantor nor an insurer for employees. There is no evidence in this case that the Union has acted in bad faith in carrying out its responsibilities toward Mr. Heard nor is there anything in the evidence which would indicate that

Mr. Campbell, the Union representative was improperly motivated during the period when he attempted to secure employment for Mr. Heard. Further, we are of the view that neither Mr. Campbell nor the Union have acted in an arbitrary manner. The standard requirement of the Union is not one of perfection and we are satisfied bearing in mind the limitations in the situation that the Union has made reasonable efforts to secure both benefits under the Collective Agreement and employment for Mr. Heard.

We are also of the view that efforts have been made by the Employer to secure employment for Mr. Heard despite his limitations. It is unfortunate indeed, that Mr. Heard has been unable to secure employment but the failure in these circumstances does not mean that the Union has been derelict in its duty or that the Employer has acted improperly.

Mr. Heard has suggested that the Union file a grievance on his behalf, but we fail to see what remedy Mr. Heard could obtain through the filing of a grievance since it appears from the evidence that the Employer has made efforts to secure employment on his behalf. The filing of a grievance would be futile and therefore the failure to file a grievance by the Union is not a breach of its duty to represent Mr. Heard.

We note that the Union has also undertaken to continue its attempt to secure employment for Mr. Heard.

In the result, the complaint is dismissed.

DATED at Toronto this 28th day of October, 1981.

A handwritten signature in dark ink, appearing to read "O. B. Shime", written above a horizontal line.

O. B. Shime, Q.C., Chairman
for the Tribunal

/lb

BETWEEN: Mr. B. H. Peterson

Complainant

- And -

Ontario Public Service Employees
Union

Respondent

BEFORE: O. B. Shime, Q. C., Chairman
W. G. Wright and
W. Walsh, Tribunal Members

APPEARANCES AT THE HEARING: B. H. Peterson in person
Ian Roland, Counsel, & others
for the Union

DATE OF HEARING: September 29, 1982

DECISION OF THE TRIBUNAL

In this matter, a number of complaints were filed, and all of the evidence with respect to those complaints was heard together.

Subject to the following remarks, the evidence does not disclose that there has been a violation of the Act. It does appear that an official of the local union was somewhat over-zealous. However, the union is composed of many individuals and where, in the circumstances of this case, the conduct of one individual is balanced by the responsible conduct of another individual, the totality of the conduct and actions must be assessed.

The union's staff representative conducted himself in a responsible manner insofar as the complainant is concerned so that there was no bad faith or misrepresentation within the meaning of the Act. Moreover, the staff representative has indicated through counsel that he is prepared to inform the local union official of the union's policy when soliciting membership.

Accordingly, after considering all of the evidence with respect to the various complaints, we are unable to conclude that the Act has been violated, and all the complaints are dismissed.

Dated at Toronto, Ontario this 19th day of October, 1982

O. B. SHIME, Q. C.
Chairman

BETWEEN: Mr. Bernard Pulford Applicant

- And -

The Crown in Right of Ontario
(Ministry of the Attorney
General) Respondent

BEFORE: O. B. Shime, Q.C., Chairman and
J. McGivney, Q.C., and E. McIntyre,
Tribunal Members

APPEARANCES AT THE HEARING: W. A. Lokay for the Applicant
and J. Zarudny for the
Respondent

DATE OF THE HEARING: June 19th, 1981

DECISION OF THE TRIBUNAL

This is an application pursuant to Section 38
now Section 40 of *The Crown Employees Collective Bargaining
Act* to determine whether Mr. B. Pulford who is a Law Clerk
in the Ministry of the Attorney General is an employee
within the meaning of the Act.

Mr. Pulford has been a Law Clerk in the Ministry
of the Attorney General since 1965 and currently reports
directly to Mr. D. Read who is the Claims Manager.
Mr. Pulford is involved in collecting money from offenders

under *The Criminal Injuries Compensation Act*. From time to time he has been called upon to conduct investigations where offenders cannot be located and for other matters as well. He also serves papers and collects legal documents, conducts searches in the Registry Office and checks for death and birth certificates.

In May 1970, Mr. Pulford was classified as a Clerk 7, General. In that capacity, he was involved in small claims matters against the Crown. The office where he works has undergone organizational changes over the years; Mr. Pulford is not involved in the management of the office but he is involved in small claims matters or cases in Small Claims Court under the direction of Mr. Read. He is currently involved with property damage matters and thus deals with ascertainable sums only.

Mr. Pulford receives files from either Mr. Read or a Solicitor in the office and works under their direction. Thus any settlements are discussed by Mr. Pulford with the person who has primary responsibility for the file and while Mr. Pulford may make recommendations, he only acts on instructions. Mr. Pulford has never dealt with a labour relations matter.

The Union submits that there is no valid legislation to exclude Mr. Pulford from the bargaining unit. The Union also submits that he does not have a management role;

that he is not involved with labour relations matters and that there is no conflict of interest that should bar Mr. Pulford from the bargaining unit. The Union argues that Mr. Pulford works under the control and direction of others in the office and does not exercise any independent discretion.

The Employer submits that when Mr. Pulford settles a case as part of his duties in resolving small claims matters, he determines claims. The Employer also argues that in reporting to the Director of the Crown Law Office, that Mr. Pulford is employed in a confidential capacity to an excluded person within the meaning of Section 1(1)(m) of *The Crown Employees Collective Bargaining Act*. Further, the Employer asserts that Mr. Pulford has access to files that are handled by lawyers on a solicitor-client basis and thus are confidential. Finally, the Employer submits that Mr. Pulford might be used to investigate labour relations matters that arise between The Crown in Right of Ontario as Employer and its Unions. In support of its position, the Employer invokes a number of the subsections contained in Section 1(m) of *The Crown Employees Collective Bargaining Act*.

At the outset, it is important to note that Mr. Pulford is not employed in a managerial or supervisory role with respect to others who are employees. Nor is he

involved as part of a management team exercising managerial or executive functions in a classical sense.

Also the Employer submitted that because he is also responsible to the Director of the Crown's Civil Law Office, that Mr. Pulford is employed in a position that is confidential to a person who is managerial within the meaning of Section 1(1)(m) of the Act, and thus Mr. Pulford is excluded within the meaning of Section 1(m)(vi) of the Act. We think not; Section 1(m)(vi) is intended to exclude persons who are necessarily adjuncts to managerial persons and are required by management in order to conduct the proper business of management and as such should properly be considered as necessary to the management team. Thus in The Crown in Right of Ontario v. OPSEU unreported, June 8, 1977, this Tribunal in a case involving the private Secretary to the Director of Forensic Sciences unanimously stated as follows:

The clear wording of the section excludes "a person who is employed in a position confidential to..." an enumerated group of people. What the subsection does not seek to exclude, in our view, is the category of persons who may have a conflict of interest because of their confidential knowledge. The thrust of the subsection is intended to have a more positive effect; it is intended to exclude persons in order to facilitate the operations of a management team. The subsection recognizes that persons in government are required in key decision making roles both with respect to formulating government objectives and policy and also with respect to dealing with employer-employee relations.

It envisions a team concept of governmental decision making in which there are employee adjuncts to the decision making process who may be said to be an integral part of the team notwithstanding that they do not have a decision making role. Thus Miss Smith may attend grievance meetings or supervisory meetings with Mr. Lucas and take notes of the meeting or make reports of the meeting for his use. She may also be required to attend intergovernmental meetings where confidential policy or budgetary matters are discussed. What subsection (1)(m)(vi) appears to contemplate is that persons who are closely allied or integrated with government decision making be excluded from collective bargaining. The concept was, perhaps, best expressed by Mr. Lucas when he referred to Miss Smith as part of the executive group. Thus what is contemplated by the subsection in our view is the exclusion from collective bargaining of persons who are considered part of the executive group and necessarily incidental to its function or as the statute states "employed in a position confidential to any person" who is a member of the executive group as enumerated in the preceding parts of section 1(1)(m). This does not contemplate persons who do the odd piece of clerical or secretarial work for a member of the executive group, but it clearly contemplates someone such as Miss Smith whose full time is engaged in the performance of duties and responsibilities for the Chief Executive Officer of the Centre of Forensic Sciences, who, is involved in a substantial number of matters that are of an executive nature and are to be considered confidential.

The evidence in this case does not go so far as to show that Mr. Pulford is allied with the Director in such a way that the exclusion is required.

Essentially, Mr. Pulford reports to the Manager of Claims. While the Director has the ultimate responsibility for his work, Mr. Pulford is not allied with the

Director in his work or part of the management team. In the hierarchy of government persons in executive or management positions will ultimately bear the responsibility for many people who work under them. If we were to exclude persons because a member of management is ultimately responsible for their work or because employees report to them directly or indirectly, it might virtually exclude everyone from the bargaining unit. We do not think that was the intent of the legislature under Section 1(1)(m). Because the Director bears the ultimate responsibility for Mr. Pulford and because Mr. Pulford may from time to time perform duties or functions that are requested of him by the Director, does not in our view bring him within the definition of a person employed in a position that is confidential to any of the management persons enumerated in the preceding parts of Section 1(1)(m) of the Act.

We are also of the view that confidential information obtained by Mr. Pulford in the course or scope of his duties as a Law Clerk does not prevent his exclusion from the bargaining unit for a number of reasons. First, there are many people in government, in the various Ministries, who obtain or have access to information of a confidential nature who are included in bargaining units. Second, Mr. Pulford's information of that nature is limited in nature and scope and there is nothing in the information

or the requirement that such information is subject to a solicitor-client privilege that precludes him from being a member of the bargaining unit. Third, Mr. Pulford performs a very limited role under constant direction from lawyers in the office and the limitations of his role are such that there is no reason to exclude him from collective bargaining.

We have one reservation in that regard and that concerns the possibility that Mr. Pulford might be involved in a labour matter concerning members of the bargaining unit. To date, there is no evidence to show that Mr. Pulford has been involved in a labour matter involving the Employer and members of the bargaining unit. That is how the evidence stands to date and to attribute anything more to his job is only speculative. But should any question arise in the future as a result of any involvement by Mr. Pulford, that question may be referred to the Tribunal under Section 40(1).

The only other matter that ought to place Mr. Pulford outside of the bargaining unit is his involvement in the settlement of claims in Small Claims Court. The Employer submits that such duties bring Mr. Pulford within the meaning of Section 1(1)(m)(v) of *The Crown Employees Collective Bargaining Act* which provides as follows:

(m) "person employed in a managerial or confidential capacity" means a person who,

(v) adjudicates or determines claims for compensation which are made pursuant to the provisions of any Statute,

In short the Employer submits that when Mr. Pulford settles small claims matters, that he determines claims.

In our view, Mr. Pulford does not fall within Section 1(1)(m)(v) either in law or in fact. The section must be viewed in context. As the Tribunal has indicated previously, Section 1(1)(m) contains a hierarchy of persons who are excluded from the Statute. Section 1(1)(m), in our view, contemplates persons who exercise a judicial or quasi judicial function and of some rank. Thus a person who adjudicates is a person who has the authority to resolve claims between competing interests in a judicial or quasi judicial context. The phrasing of the subsection suggests that the verb *determines* be given a parallel and equivalent meaning. Thus a person who determines claims in our view is a person that exercises an independent discretion in the determination of a claim under a Statute.

We do not feel that it was the intent of the legislature that a Law Clerk acting under instructions on behalf of a litigant or potential litigant is a person who "adjudicates or determines" claims. At the very most, Mr. Pulford settles claims based on an expectation about

what might happen if the property damage claim went to Court. If the claim is not settled, it will be settled by the Court. But settlement does not mean determination. Mr. Pulford does not have the authority to determine a claim, he can only settle a claim based on what some one else may adjudicate or determine; he is not the final authority.

Moreover, even if we were to concede the meaning suggested by the Employer which we do not, we are not prepared to find that Mr. Pulford determines claims. He settles claims under the control and direction of others. While Mr. Pulford is highly experienced, and undoubtedly his recommendation is persuasive, he does not have the final authority to settle claims. That authority rests with Counsel or others in the office. Mr. Pulford does not have an independent discretion. As such he is not the person who settles the claim.

In the result, we find that Mr. Pulford is not employed in a managerial or confidential capacity and accordingly, he is an employee within the meaning of the Act.

DATED at Toronto this 20th day of November, 1981.

A handwritten signature in dark ink, appearing to read 'O. B. Shime', written above a horizontal line.

O. B. Shime, Q.C.
for the Tribunal

/lb

BETWEEN:

Mr. Arthur Duck

Complainant

- And -

Ministry of Revenue
Assessment Branch

Respondent

BEFORE:

O. B. Shime, Q.C., Chairman
W. G. Wright and
W. Walsh, Tribunal Members

APPEARANCES AT THE HEARING:

Arthur Duck for Himself
G. W. Sholtack, Counsel for the
Employer


DATE OF HEARING:

September 29, 1982

DECISION OF THE TRIBUNAL

Having regard to the submissions of the parties, the proceedings herein are now adjourned sine die until all matters currently before the Grievance Settlement Board are resolved.

Dated at Toronto this 14th day
of October, 1982.



O. B. Shime, Q. C.
For the Tribunal

BETWEEN: Canadian Union of Public Employees
Local 1750

-
Applicant

- And -

The Crown in Right of Ontario
(Workmen's Compensation Board of Ontario)

Respondent

BEFORE: O. B. Shime, Q.C., Chairman
J. H. McGivney, Q.C. and
P. J. J. Cavalluzzo, Tribunal Members

APPEARANCES AT THE HEARING: M. Mitchell, Counsel
for the Union
C. G. Riggs, Counsel
for the Employer

DATE OF HEARING: December 8, 1981

DECISION OF THE TRIBUNAL

This is an application pursuant to section 40(2) of *The Crown Employees Collective Bargaining Act* in which the Tribunal has been asked to determine whether certain matters involving job classification and job evaluation are within the scope of collective bargaining.

The history leading up to this application is a relevant and important consideration in arriving at our decision. The union and the employer entered into a first collective agreement which was effective from October 3, 1975 to September 30, 1976. That

agreement contained a provision dealing with job classification. The next agreement which was effective from October 1, 1976 until September 30, 1977 followed a decision of a board of arbitration dated May 3, 1977 and also contained a provision respecting job evaluation and classification.

The next agreement which was effective from October 1, 1977 to September 20, 1978 also followed an arbitration award dated September 29, 1978. It is significant that before that board of arbitration the employer objected to the union's proposal with respect to job evaluation because it violated section 17 of the Act. The matter was not referred to the tribunal nor was there any attempt to review the decision of the board of arbitration.

When it came time to renew that collective agreement the union forwarded to the employer a job evaluation proposal. On May 11, 1979, the employer wrote to the union and stated the following:

With respect to referring the matter to arbitration, we would take it that in accordance with the provisions of *The Crown Employees Collective Bargaining Act*, the bodies which would have jurisdiction over these matters are the Grievance Settlement Board and the Ontario Public Service Labour Relations Tribunal and we would suggest that any application be forwarded to the appropriate body.

On May 23, 1979 the union responded to the employer and indicated an intention to proceed to arbitration and not to the Grievance Settlement Board or the Tribunal.

On May 29, 1979 the employer again wrote to the union and stated inter alia,

It is acknowledged that the arbitration award of September 28, 1978, provided for arbitration on this matter; however there was no thought on the part of the Employer that this might be interpreted as a process

that was not in accordance with *The Crown Employees' Bargaining Act*.

It is our considered view that any matters of this nature should be referred to the Ontario Public Service Labour Relations Tribunal.

By July, 1979, a Board of arbitration was established under Dean S.M. Beck and again the employer took the position before that Board to "make clear in the award that disputes which arise under the collective agreement or under the bargaining relationship affecting job evaluation and classification must be referred to either The Grievance Settlement Board or, in the appropriate case, to the Ontario Public Service Labour Relations Tribunal."

In a decision dated August 8, 1979 Dean Beck appointed J. F. W. Weatherill to deal with the matter in dispute under section 18 of the collective agreement. That article provided for a committee to deal with the job evaluation system and further provided that any dispute between the parties should be referred to an arbitrator jointly appointed by the parties.

When the matter came before Mr. Weatherill, the employer again argued that the Board of arbitration did not have jurisdiction, but Mr. Weatherill in an interim award dated February 4, 1980, concluded that he did have jurisdiction to deal with the matter. He then indicated an intention to proceed with the matter "subject, then, to judicial direction to the contrary--".

Before proceeding to the next phase in the process, there are certain clear and undisputable facts which should be borne in mind. First, the employer had for some period of time been concerned about the jurisdictional matters that

appeared to it to have arisen in connection with the union's proposals; the union's position was not a surprise to the employer. Second, the employer was well aware of the provisions of the Act and of the Tribunal's authority to deal with issues of jurisdiction. Third, the employer must have been aware that it too, and not only the union, had the right to apply to the Tribunal on questions affecting the scope of bargaining. Fourth, the right of the employer to apply existed not only during "...the course of bargaining..." but also "during proceedings before a board of arbitration". And, finally, it was open to the employer to request the board of arbitration to refer the matter to the Tribunal. Here there was a situation of clear knowledge and a clear right to have any question decided.

Faced with that knowledge and its clear right to have the Tribunal deal with the matter the employer elected to proceed before Mr. Weatherill. It chose not to come to the Tribunal or to have Mr. Weatherill's interim decision reviewed by the Court. The employer contested the matter before Mr. Weatherill although it does appear, according to the Weatherill award of July 4, 1980 that the employer again objected to the union's proposals. Mr. Weatherill commented that "these arguments...were really elaborations of arguments made at the first hearing of this matter and dealt with in the interim award."

The Weatherill award dealt with the job evaluation plan and subsequently the employer moved for judicial review to quash the award.

On April 22, 1981 the Divisional Court dismissed the employer's application. In a most careful and thoughtful decision, Robins J., speaking for the court, reviewed the history of the matter and decided that the question "was one that the legislature intended to be referred to the Tribunal for final and binding decision." The court "having regard to the availability to the W.C.B. throughout the lengthy history of this matter of a speedy and efficacious means of resolving the issues raised by it..." exercised its discretion and refused to entertain the application.

The employer now contends that this Tribunal has jurisdiction to deal with the matter while the union submits that we do not have jurisdiction and that the application is out of time. The union also submits that there is co-ordinate or equivalent jurisdiction to the Tribunal in the arbitration board and that the Tribunal does not have the jurisdiction to now resolve the issue.

It is clear that in matters concerned with the scope of bargaining that the Tribunal has priority or paramountcy under the Act, but that does not mean that a board of arbitration cannot decide issues of that nature that are placed before it by the parties. In that respect a board of arbitration has a secondary role; the parties may have it decide issues on a consensual basis that may properly be placed before the Tribunal; the Tribunal's jurisdiction is not exclusive.

However, the Tribunal will not defer to the decisions of arbitration boards. Matters which may be decided by a

board of arbitration are not binding on the Tribunal particularly where those decisions involve questions that are within the jurisdiction of this specialized Tribunal which has, in the words of the Divisional Court, been given "specific and continuing responsibilities...to determine questions involving intricacies of bargaining between the provincial government and its employees."

Also, where requested to do so, as section 40 contemplates, an arbitration board should defer to the Tribunal. It may do so substantively by adopting a decision of the Tribunal on a particular issue or procedurally, by referring a question (where there is any doubt) to the Tribunal under section 40. The procedure before a board of arbitration is clear. The parties have an opportunity to refer the matter during bargaining, that is prior to arbitration, and they and the board of arbitration have the opportunity to refer the matter "during proceedings before an arbitration board." That avenue was not adopted by the employer despite its concern and its full knowledge of the procedures available to it.

Moreover, there are other considerations such as speed and expediency. It is contrary to the collective bargaining process to permit the matter to proceed when there is appropriate procedural recourse and then to attempt to come through the back door, so to speak. This was a situation where the employer with full knowledge had every opportunity to make an application. Even when it was at the brink and there was a long period between the Weatherill

interim award and the hearing on the merits, it did not elect to proceed to the Tribunal.

The employer did not proceed while the parties were in the course of bargaining nor during proceedings before a board of arbitration as contemplated by section 40(2). It is now too late; bargaining is completed and so are the proceedings before the Board of arbitration, and the employer has, by its conduct, in effect waived its right to proceed to the Tribunal. It has elected to have the board of arbitration decide the very question that it could have had the Tribunal decide.

While this Tribunal, as we have indicated, is not in any sense bound by a decision of the board of arbitration with respect to the merits of a particular question, it does recognize that the parties may opt either by express agreement or by their conduct to have a board of arbitration decide whether a particular issue falls within the scope of bargaining rather than the Tribunal. That decision is therefore binding on the parties although not on this Tribunal. Accordingly, it is our view that the Board of arbitration has decided the issue and the employer's application is not time. The application is dismissed.

DATED at Toronto, Ontario this 24th day of January, 1983.



O.B. Shime, Q.C.
for the Tribunal

2021 - IM decision, - IM award

2024 - JM award

ONTARIO PUBLIC SERVICE LABOUR RELATIONS TRIBUNAL

T/26/81

Between:	Miss M. Eiber	Applicant
	- And -	
	Ontario Public Service Employees Union	Respondent Employee Organization
	- And -	
	The Crown in Right of Ontario as represented by Management Board of Cabinet	Respondent Employer

Decision

Having regard to the agreement of the parties and pursuant to Section 16 of *The Crown Employees Collective Bargaining Act*, the Tribunal determines that the provisions of the collective agreement pertaining thereto do not apply to the applicant, M. Eiber and that M. Eiber is not required to pay dues or contributions to the respondent employee organization.

The Tribunal further determines, in accordance with the agreement of the parties that amounts equivalent to dues or contributions to the respondent employee organization be remitted to the Toronto Humane Society (0203299-54-13).

O. B. Shime, Q.C.
for the Tribunal

BETWEEN:

The Crown in Right of Ontario
(Liquor Control Board of Ontario
and
Liquor Licence Board of Ontario)

Applicants

- And -

Ontario Liquor Boards Employees' Union

Respondent

BEFORE:

O. B. Shime, Q.C., Chairman
J. H. McGivney, Q.C. and
E. McIntyre, Tribunal Members

APPEARANCES AT THE HEARING:

C. G. Riggs, Q.C., Counsel
for the Employer
M. Levinson, Counsel
for the Union

DATE OF HEARING:

March 22, 1982

DECISION OF THE TRIBUNAL

This is an applicant pursuant to section 40(2) of *The Crown Employees Collective Bargaining Act* in which the employer has raised certain issues arising from the award of a Board of Arbitration which extended benefits to retirees.

The applicant and the union were parties to a collective agreement from July, 1977 to June 30, 1978. During the course of bargaining for a new collective agreement, the union made a demand for an increase in life insurance coverage. On April 4, 1979, the board of arbitration issued an award which provided for life insurance and more particularly an

improvement for retirees. Previously, the collective agreement had provided coverage for persons who retired during the currency of the collective agreement but had never provided for retroactivity for persons who had retired prior to the effective date of the agreement.

After the award was issued, the union requested that the improvements in life insurance coverage extend to persons who had retired in the past. The employer objected to such an extension, however, the majority of the board of arbitration in an award dated June 29, 1979 determined that the improvement in benefits apply to "all retirees current and future". Counsel for the employers wrote to the chairman of the board challenging the jurisdiction of the board to award the benefits to retirees. In a further award dated October 17, 1979 the board concluded that it did have jurisdiction to award the benefit to retirees.

At this juncture we note that the employer had ample opportunity when the matter arose to refer the matter to the Tribunal or to have the board of arbitration refer the question to the Tribunal. Section 40 of the Act is quite clear. The employer did not proceed in the manner suggested by the Act but elected to have the board of arbitration decide the issue.

The employer then proceeded to the Divisional Court where the matter was dealt with on the merits and the employer's application was dismissed. The employer then appealed the matter to the Court of Appeal which endorsed the record as follows:

"We are all of the view that the question in issue arose during the course of the "proceedings" as that word is used in s.40(2) of *The Crown Employees Collective Bargaining Act, 1972 (Ont.) c.67*. The question could have been and should have been taken to the Tribunal qualified to deal with these questions--The Ontario Public Service Labour Relations Tribunal. We do not propose to exercise our discretion in favour of the applicant and the appeal is dismissed with costs. There will also be no costs of the application for leave: See Workmen's Compensation Board and Canadian Union of Public Employees, Local 1750 et al."

At this point it is useful to set out s.40(2) of the Act which is as follows:

If, in the course of bargaining for a collective agreement or during proceedings before a board of arbitration, a question arises as to whether a matter comes within the scope of collective bargaining under this Act, either party of the board of arbitration may refer the question to the Tribunal and its decision thereon is final and binding for all purposes. 1974, c. 135, s. 15.

The union submitted that this Tribunal did not have jurisdiction to deal with the issue as the application was out of time. The employer argued that the decision of the Court of Appeal coupled with the decision of the Divisional Court in *The Workmen's Compensation Board* case charge the Tribunal with responsibility to determine the substantive issue raised.

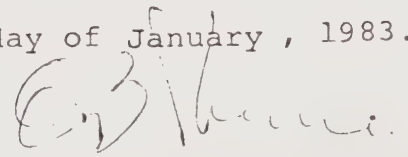
After considering the arguments we do not find a sufficient basis in this application to depart from our decision in Canadian Union of Public Employees, Local 1750 and The Crown in Right of Ontario (Workmen's Compensation Board of Ontario), unreported dated January 24, 1983. In that case the relationship between this Tribunal and Boards

of arbitration is delineated. While this Tribunal has priority or paramountcy, it does not preclude a board of arbitrators in its secondary role, deciding issues before it. The Tribunal's jurisdiction is not exclusive.

We are in agreement with the views of the court of appeal that the "question in issue arose during the course of the "proceedings" as that word is used in s.40(2) of *The Crown Employees Collective Bargaining Act, 1972 (Ont.) c. 67*". However, the proceedings before the board of arbitration are concluded and so has the bargaining. The parties are no longer in the course of bargaining with respect to the collective agreement in issue; also the proceedings have concluded so that one cannot say that this application was brought "during proceedings before a board of arbitration". The application is, therefore, untimely.

Accordingly for these reasons and for the reasons given in the Workmen's Compensation Board case, supra the application is dismissed.

DATED AT Toronto, Ontario this 24th day of January, 1983.



O.B. Shime, Q.C.
for the Tribunal

/ch

?

nt

ort

ent
e
...

ation

ent
r

BETWEEN:

Ontario Public Service Employees Union
(T. Cairns, et al)

Applicant

- And. -

The Crown in Right of Ontario
(Management Board of Cabinet)

Respondent

BEFORE:

O. B. Shime, Q.C., Chairman
L. Binder and
E. McIntyre, Tribunal Members

APPEARANCES AT THE HEARING:

W. J. Gorchinsky & others,
for the Employer
W. A. Lokay & others,
for the Union

DATE OF HEARING:

October 19, 1982
November 17, 1982

DECISION OF THE TRIBUNAL

This is an application pursuant to section 40(1) of The Crown Employees Collective Bargaining Act to determine whether party chiefs and senior party chiefs are employees within the meaning of the Act. These people are employed in field operations with the Ministry of Transportation and Communications, and they perform engineering and legal surveying for contract engineering, property acquisition and other related services of the Government of Ontario.

At the outset a question arose whether to proceed to examine one of the senior party chiefs or a number of them. As a

general rule when dealing with a large group or category of employees or persons having the same position title, it is preferable to examine only one person in the category of employees in issue as a test case. Whether the remaining employees in the group are included or excluded will depend on the Tribunal's view of the test case.

There are times, however, when the work of different people with the same job title will vary and either the employee or the union will want to have some of those people included or excluded as the case may be. Under those circumstances, it will be necessary to examine all of the employees and make individual determinations about their duties and responsibilities. It is not practical to use one or two or three employees as representative of the group because the Tribunal may find that one of those persons should be excluded and one included which does not resolve the problem of the parties in determining the inclusion or exclusion of the group as a whole. Thus, the better practice is to examine one employee with the position title or to examine all of them; there is no other practical way to deal with the matter.

Because the parties could not agree as to the procedures in this matter, the Tribunal heard evidence with respect to five employees with the job title of senior party chief and our determination in this matter is with respect to the individual employees only and does not represent our view of all of the people in the group who have the same position title. Nonetheless, since our decision is the same with respect

to the five employees, it may be appropriate for the parties to seriously consider the position of the remaining individuals in the light of this decision.

The party chiefs generally work with a small crew of three other people doing survey work in the field along with the senior party chief. There are usually three technicians including a transit man and two chainmen. The party chief co-ordinates the crew and the method of doing the survey. The party chief spends the majority of time calculating and doing mathematical calculations and preparing field notes and may from time to time work with the crew.

The survey crew or field party is supervised in turn by a field supervisor who has the responsibility of supervising three or four crews. The supervisor is not on the job constantly but periodically checks the crews in the field.

The people in the crew do not report into an office in the morning but meet at a prearranged location in a general geographic area. They travel to work by car and, depending on the location and the nature of the job, they may remain out of town.

The senior party chief does not hire, but it appears that he may impose at least some limited discipline in consultation with his supervisor. There is also a limited handling of grievances by the senior party chiefs, but it appears that they are relegated to passing grievances from the employees to their head office and back again.

The senior party chiefs do performance evaluations, grant casual time off, keep attendance records and help to train people on the job. They also assign work to the crew on

a daily basis and review their expense accounts. Generally, the senior party chief has the day to day responsibilities for the crew, for what it does and when it is to be done.

From time to time, senior party chiefs sign workmen's compensation forms as the Supervisor, and they have recommended hiring of summer students or unclassified employees.

There were some slight and subtle variations with respect to the employees examined and it was apparent that those variations arose from the manner in which each of the employees perceived his role. Also, the way each of the senior party chiefs conducted himself was to some extent a reflection of his personal characteristics. With that, a very definitive impression of the duties and responsibilities of the senior party chiefs emerged.

At this juncture, it is important to consider certain general factors that also became apparent during the course of the hearing. In a large, major organization, there is a tendency to be consistent in administrative personnel. To achieve that end, those who are responsible centralize personnel policies. Thus, for example, regulations regarding expenses are centrally promulgated and are consistent throughout the government.

Ministerial centralization may also occur. Thus, hiring may be done in the ministry, and such other matters as promotion or job evaluation may be centrally controlled at the ministry level. The net effect of centralization is to reduce the managerial duties and responsibilities of those who function at or near the end of the management line. Those people who were traditionally managers are thus reduced to administrators

of centralized personnel policy and do not exercise classical management duties and functions which require some form of independent decision making and discretion. They simply become conduits for administering predetermined personnel policies which have been centrally determined.

That movement to a centralized decision-making process was very apparent in these proceedings in the area of grievance administration. Under the act a person is managerial who "...is required by reason of his duties or responsibilities to deal formally on behalf of the employer with a grievance of an employee." In our view, dealing formally requires something more than transmitting documents from an employee to someone higher in authority and visa versa. It presupposes some form of authority on the part of the supervisor or manager to deal or to negotiate the matter with the employee. The supervisor or manager may consult with those higher in order to ascertain policy, but within that framework there ought to be some independent discretion to deal with the employee or the union in order to resolve the differences. If the employer is to rely on that ground to exclude employees, it will have to extend some authority to "deal" to the alleged managerial person.

In this case, it appears that some of the senior party chiefs were used as a mere conduit in the grievance process. Their replies to the grievances were typed by someone at head office without consultation with the party chiefs and merely signed. The grievances were received by the senior party chiefs from the employees and merely passed on to head office. In our

view, those types of actions do not fall within the language of the act and the employer cannot rely on the provision which allows exclusion from the bargaining unit for those dealing formally with grievances.

In this case, there were two other practical tests that were in conflict. Generally, one must look closely at the ratio of managers to employees. A manager is not required for every small group. It is not credible to expect that there will be a manager for every two or three employees unless special circumstances dictate. Thus, given the size of the field crews, one must be suspicious of the need for a management person particularly where the employees are reasonably skilled and tend to know their job.

In conflict with that theory of management is the theory that where employees operate in the field or outside of a regular office there is some need for someone to manage in the event difficulties do occur. While things are operating smoothly as they generally do, there is not a great need for a manager, and it even appears that those who are really vested with authority do not exercise managerial responsibilities. Great care must be taken in scrutinizing those situations.


In this case, the tendency to centralized personnel administration and the small size of the crews detracts from the apparent managerial authority. On the other hand, the senior party chiefs have duties and responsibilities which vary from the others in the crew. They are not mere employees but, as some suggested, they are responsible for overseeing

both the crew and the day-to-day workload of the crew.

It is a reasonable inference from the evidence that the senior party chiefs are responsible for problems as they arise. Thus, if there was some difficulty with the work or with the men and a managerial decision was required, it would be the senior party chiefs who made that decision. They are the supervisors in the field, and it emerges quite clearly from the evidence that they are the persons responsible for management in the field. Thus, for example, Mr. D. Rodger testified that he was "the boss of the crew" while Mr. W. A. Roberts stated that he had "responsibility for the crew... for what it does and when. I have continuing responsibility." Mr. James Orr, a technician, also testified that the "party chief determines what is to be done daily" and that the "party chief is at the helm". Mr. Anthony Cairns, another party chief, stated that "I am responsible for day to day-- what has to be done and when it has to be done". That same thread existed in the evidence of the party chiefs and others including crew members who testified.

In the result, it is our view that all the senior party chiefs examined in these proceedings, although their roles, somewhat varied, exercised a supervisory role with respect to the survey crew and, accordingly, we determine that in view of their complete role, they spent a significant portion of their time in the supervision of employees and are, therefore, employed in a managerial capacity within the meaning of the act and are not employees.

DATED at Toronto, Ontario
this 6th day of
April, 1983



O. B. Shime, Q.C.
For the Majority

ADDENDUM

In her dissent, Board member McIntyre refers to the distinction between professional supervision and managerial supervision. We do not disagree with the distinction. It is quite true that the party chiefs exercise professional supervision but the distinction in this case is that they also exercise managerial supervision. Board member McIntyre quite correctly points out that "if managerial problems should then arise the senior party chiefs may be responsible for the resolution of such problems." It is our view that very few managers exercise managerial responsibility one hundred per cent of the time. What is important in this case is that the crew operates in isolation and thus while the senior party chief may be performing specific functions of a professional nature the senior party chief is always "on call" should a managerial problem arise. That managerial responsibility coexists with his professional duties and functions.

D I S S E N T

While I am in basic agreement with the Chairman's analysis of the facts and his description of the job performed by the senior party chiefs, I am unable to concur in the conclusion reached. In particular, I dissent from the finding that the senior party chiefs spend a significant portion of their time in the supervision of employees and are, therefore, employed in a managerial capacity within the meaning of the act.

It was clear from the evidence, that the senior party chiefs spend a large proportion of their time in doing the necessary technical calculations for the work of the crew. This work is done completely independently from the other crew members and involves no supervision whatsoever. The balance of the senior party chiefs' work is the general direction and supervision of the other members of the crew in the field work necessary for the surveying. Under certain circumstances, the senior party chief participates in the actual field work. While this aspect of the senior party chief's responsibility involves the supervision of other employees, in my view, this is not supervision within the meaning of the Act. Rather, it is supervision of a technical nature over the work of other employees, which supervision is often part of the job of professional employees.

The distinction between professional supervision and managerial supervision was dealt with extensively in the decision of the Ontario Labour Relations Board in Ontario Nurses Association and Oakwood Park Lodge [1982] O.L.R.B. Rep. January 84 where the Board states as follows at page 92:

"As a collective bargaining extends to technical and professional employees (engineers, for example, were specifically included in the Act only in 1971), the Board had had to deal with increasingly complex job hierarchies and reporting structures. In a professional context, the members of the bargaining unit are likely to be highly trained and responsible persons who are largely self-motivated, capable of exercising independent judgment and requiring little external direction in the performance of their regular duties. Such direction as is necessary will often be generated internally through group discussion, evaluation by peers, or "collegial" modes of decision-making; and one should not expect to be the same as that for manual workers. The technical or professional employee will have a special relationship with management, with fellow professionals, and with the less skilled employees at lower levels on the job hierarchy. It is the latter relationship which is material to this case.

Persons who exercise skills which have been acquired through years of training or experience will necessarily have considerable influence over those who are less trained or experienced. The most highly trained or skilled employees will routinely supervise the work of others, and it is part of their normal job functions to train and direct such persons, and to instill good work habits. Frequently, it is only the most senior or experienced employees who will fully understand the technical requirements of the job and, accordingly, it is they who will allocate work between themselves and the other employees in order to accomplish the task in a safe and efficient manner. It is part of their job to ensure that appropriate techniques are being applied and that the work is being done properly. Their expertise and technical judgment are an integral part of the group effort. In such circumstances, it is inevitable that they will have a special place on the "team" and will have a role to play in coordinating and directing the work of other employees - but this does not mean that they exercise managerial functions in the sense contemplated by section 1(3)(b) and must therefore be excluded from the ambit of collective bargaining. To adopt so rigid a view would deny thousands of skilled or professional employees the right to engage in collective bargaining, simply because they typically work in semi-autonomous work groups which include a variety of individuals with lower levels of skill, education or training (in the case of "master craftsmen", these would include

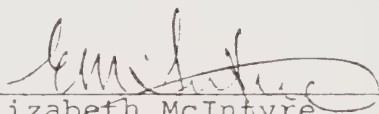
"journeymen", "apprentices", and assorted "helpers"; and in the case of "professionals", a variety of "technologists", "technicians", assistances and aides). To hold that persons with higher levels of education or training (whether acquired on the job or otherwise) exercise "managerial functions" with respect to lesser skilled or unskilled individuals at lower levels of the job hierarchy would be tantamount to saying that the Act has no application to much of highly trained and educated work force which is characteristic of the emerging high technology industries. This is not to deny that professional or technical employees may also exercise "managerial functions" within the meaning of section 1(3)(b). It is simply that the focus should be upon those functions which have a direct and provable impact (positive or negative) upon the terms and conditions of employment of the alleged subordinate employees. It is that kind of function which raises the "collective bargaining" conflict to which section 1(3)(b) is addressed, and it is this collective bargaining purpose which must be kept in mind when the Board is exercising the broad authority granted to it under section 1(3)(b), and is forming its "opinion" in particular cases."

Although that decision dealt with an interpretation of the Ontario Labour Relations Act, it is of assistance in applying the provisions of the Crown Employees Collective Bargaining Act. In my view, the term "supervision" as found in the latter statute should be interpreted to mean managerial supervision and not professional supervision. When the evidence in this case is analyzed to filter out those functions of the senior party chiefs which have a direct impact upon the terms and conditions of employment of subordinate employees, it is seen that opportunities for exercise of such functions rarely arise. While the Chairman is quite correct in suggesting that if managerial problems should arise, then the senior party chiefs may be responsible for the resolution of such problems. This results from the fact that the crew is

isolated from its supervisor a great deal of the time. However, the matter should not be determined on hypotheticals. In this context where managerial problems virtually never, in fact, occur, it cannot be said that senior party chiefs spend a significant portion of their time in the exercise of such duties.

I would conclude that senior party chiefs are not employed in a managerial capacity.

February 2nd, 1983.


Elizabeth McIntyre
Board Member

ONTARIO PUBLIC SERVICE LABOUR RELATIONS TRIBUNAL

T/32/81

BETWEEN:

Ontario Public Service Employees
Union

Applicant

- And -

The Crown in Right of Ontario

Respondent

BEFORE:

O.B. Shime, Q.C., Chairman and
J.H. McGivney, Q.C. and
E. McIntyre, Tribunal Members

APPEARANCES AT THE HEARING: C. Paliare, Counsel & others,
for the Union
C.G. Riggs, Counsel & others,
for the Employer

DECISION OF THE TRIBUNAL (E. MCINTYRE - DISSENTING IN PART)

This is an application pursuant to Section 40(2) of *The Crown Employees Collective Bargaining Act* (referred to as The Act) to determine whether certain proposals put forth by the Union come within the scope of collective bargaining under The Act. The scope for bargaining under The Act is defined by Section 7 which provides as follows:

Upon being granted representation rights, the employee organization is authorized to bargain with the employer on terms and conditions of employment, except as to matters that are exclusively the function of the employer under subsection 18 (1), and, without limiting the generality of the foregoing, including rates of remuneration, hours of work, overtime and other premium allowance for work performed, the mileage rate payable to an employee for miles travelled when he is required to use his own automobile on the employer's business, benefits pertaining to time not worked by employees including paid holidays, paid vacations, group life insurance, health insurance and long-term income protection insurance, promotions, demotions, transfers, lay-offs or reappointments of employees, the procedures applicable to the processing of grievances, the classification and job evaluation system, and the conditions applicable to leaves of absences for other than any elective public office or political activities or training and development. 1974, c. 135, s.3.

The functions of the employer which are eliminated from bargaining are contained in Section 18 which is as follows:

18. - (1) Every collective agreement shall be deemed to provide that it is the exclusive function of the employer to manage, which function, without limiting the generality of the foregoing, includes the right to determine,

(a) employment, appointment, complement, organization, assignment, discipline, dismissal, suspension, work methods and procedures, kinds and locations of equipment and classification of positions; and

(b) merit system, training and development, appraisal and superannuation, the governing principles of which are subject to review by the employer with the bargaining agent,

and such matters will not be the subject of collective bargaining nor come within the jurisdiction of a board.

Any proposals put forward are thus to be considered in the light of Sections 7 and 18. The basic thrust of the Union's argument is that its proposals fall under Section 7 while the employer submits that the Union's proposals infringe its exclusive management functions contained in Section 18.

While there are issues that fall clearly within either Section 7 or 18 it is readily apparent from the proceedings in this matter that many issues are capable of being interpreted as falling under both sections. The dilemma facing the Tribunal is to determine under which heading a particular proposal falls. That dilemma may be illustrated by one of the proposals put forth by the Union which it alleges is a safety matter. There is nothing in The Act which prohibits bargaining about safety. However the safety proposal provides that no employee will be required to work alone in a mental retardation, psychiatric or correctional facility.

The employer resists the proposal on the basis that the union has infringed the employer's exclusive right to determine complement. Since the proposal clearly involves numbers of employees it is obviously capable of being interpreted in the manner suggested by the union and in the manner suggested by the employer. How then is this Tribunal to resolve the issue?

There is no reason why the two sections of The Act cannot stand together. There are many instances where the law has resolved what appears to be conflicting statutory provisions. See e.g. *Re Metropolitan Toronto Board of Commissioners of Police and Metropolitan Toronto Police Association* (1975) 8 O.R. (2d) 65. In order to determine under what section of The Act a particular proposal falls one must examine the proposal objectively in order to determine the basic nature and effect of the proposal. If after examination the proposal may reasonably be considered to fall under Section 7 it is permissible subject for bargaining notwithstanding that it may touch on matters that fall within Section 18. The converse is also true; thus if after examination, the nature and effect of the proposal are such that it may reasonably be considered to fall within Section 18 it is a prohibited subject for bargaining notwithstanding that it may touch on matters that fall under Section 7. The difficult situation, of course, is in those cases where a proposal may appear to fall equally within both Sections.

While the Tribunal is required to scrutinize or screen the proposals before they are submitted to arbitration, if it should later appear to the board of arbitration, that the proposal is not bona fide or a wolf in sheeps clothing provision designed to circumvent the provisions of The Act, the board of arbitration has an obligation to disallow the proposal or, at the least, refer it to the Tribunal under Section 40(2) of The Act. In that connection it is important to point out that in order to expedite the bargaining and to permit the parties to get on with negotiations or arbitration it is appropriate that the Tribunal merely screen the proposals and make its determinations based on a reading of the proposals coupled with brief submissions. If it should turn out that the arbitration board after hearing more extensive submissions and perhaps evidence considers that the proposals are not what they appear to be on their face it may refer the matter back to the Tribunal.

With these considerations in mind we now turn to the proposals submitted by the union. The relevant proposals are as follows:

ARTICLE 24 - JOB SECURITY

- (c) Amend those sections of the article dealing with retraining to provide that affected employees will be retrained in a position in the Ontario Public Service for one (1) year at the Employer's expense.
- (d) The parties agree that employees' work performance on such equipment will not be monitored by the equipment itself.
- (d) VDT-type equipment will be used only
- (iv) in rooms properly designed for the purpose and having lighting, furniture and wall colours and ventilation specifically designed to provide maximum protection to the equipment operators. Such standards to be approved by a committee of the Union.
- (d) Women of child-bearing age shall be
- (viii) provided with all available information about the health hazards of the VDT-type equipment, proven or theoretical, before being assigned to VDT-type equipment and any refusal thereafter to work on such equipment shall in no way jeopardize their employment.
- (d) When VDT-type equipment is introduced
- (ix) into the work-place, the Employer agrees to train existing employees in its use on the basis of seniority.
- (d) Add a new article to provide for
- (x) changing the present probationary period of up to one (1) year to "up to three (3) months".

ARTICLE 18 - HEALTH AND SAFETY

- (b) Add a new article to provide that no employee will be required to work alone on a ward or related area at any time with a patient/client/inmate in a mental retardation/psychiatric/correctional facility.

The union submits that Article 24(c) is appropriate as a measure which is aimed at job security since it seeks to avoid lay-off by requiring the employer to retrain an employee whose job may be in jeopardy. The union also points to Article 24.15 of the current agreement which provides for a joint consultation committee to attempt to discuss and resolve situations, where employees are released because of technological change, by "reallocation and retraining", as an indication that retraining is a permissible subject for bargaining. The union argues that the employers agreement to a retraining provision is evidence that there is no prohibition against bargaining about that subject.

The employer argues that under Section 18 it has the exclusive function to train and develop employees and that the union's proposal infringes that provision. The employer also submits that the current provision which provides for consultation and discussion differs considerably from a provision which provides for the automatic training of employees and that the current provision is not an admission by the employer that training and development are appropriate for bargaining. The employer also contends that the concept of retraining is included in the phrase "training and development" under Section 18.

After considering the argument it is our view that the concept of retraining is included in the phrase training and development. While training per se may be limited to an initial teaching, it is our view that the word development involves teaching or instruction that goes beyond an initial training period so as to include retraining. We are unable to conclude that the linguistic distinction extends to embrace a conceptual distinction. No fine line may be drawn between development after the initial training stages and retraining.

Also it is our view that consensual provisions or agreements made concerning matters that fall within the prohibited area of bargaining cannot estop the employer from invoking the statutory prohibitions. It is our view that in the give and take of negotiations the employer may agree to matters which fall within the statutory prohibitive areas; it may do so in response to the union's agreeing to drop other matters. Also the employer may agree to matters that ostensibly touch or encroach upon its exclusive functions on the basis that the substance of the agreement is permissible. This Tribunal does not wish to discourage bargaining or voluntary agreements which include prohibitive matters, not only because we deem it advisable to encourage voluntary agreements but also because we recognize the difficulty in

characterizing issues or proposals as properly or strictly falling within either Section 7 or 18 of The Act. It is for those policy reasons, which serve to effectuate the scheme of The Act, that we are not prepared to hoist the employer on its own petard, i.e. by barring the employer from raising the argument that it now raises.

Moreover it is our view that Article 25 in the collective agreement is to permit the employer to consult and discuss questions involving job security which derive from technological change; it does not compel training or development and thus does not infringe on the training and development provision of The Act and therefore cannot be considered in the manner suggested by the union as an admission that retraining is permitted.

We now turn to the union's proposal. It is important to note that the proposal is limited to "affected employees". Thus it does not require the employer to merely institute a training or development program per se. It is not unusual to find job security provisions requiring some form of training or development in order to give employees affected by change an opportunity to enhance their skills. While the proposal may require the employer to retrain it is our view that the nature and thrust of the proposal is to enhance job security and it is allowed.

The employer submits that Article 24 d(iii) which seeks to prevent the employees work performance from being monitored by the equipment itself infringes the employer's exclusive function to determine the work methods and procedures as well as its exclusive function regarding appraisal.

The union contends that the provision does not infringe on the employer's right to appraise employees since it merely prevents the employer from monitoring the work performance with equipment. The union also argues that the proposal is not a work method or procedure.

In our view the proposal does not involve or affect work methods or procedures. Prima facie those areas remain untouched. It is the monitoring of the work performance to which the proposal is directed.

The union contends that this proposal is not directed towards appraisal; however, the union has not indicated the precise purpose of the proposal. Absent any specific indication from the union, it appears that the section can only be directed towards evaluation or appraisal and accordingly it is prohibited.

The next item concerns the design of rooms with V.D.T. type equipment. The employer contends that this provision usurps its function to determine the "kinds and locations of equipment" under Section 18(1) (a). The union submits that the proposal does not deal with location but is concerned with the working environment.

In our view the union's contention is correct. The employer's function to determine the location of the equipment is left intact. The employer can determine the geographic location of or proper place or use of the equipment and it is only when the equipment is placed that the union's proposal becomes operative. The proposal merely requires the rooms in which the equipment is located to be designed in the manner suggested. The proposal is allowed.

Article 24(d)(viii) proposed by the union is concerned with informing women of health hazards associated with VDT type equipment and providing them with a measure of job security where they refuse to work on such equipment. The union contends that this is a safety issue while the employer submits that it interferes with its right to assign employees.

In our view this is a proper safety item coupled with a measure of job security. The provision does not impede the employer's right to assign - it merely protects a limited class of employees in limited circumstances. In that respect the proposal is similar in nature to the provisions of *The Occupational Health and Safety Act*, R.S.O. 1980, c. 321 which also applies to The Crown and is clearly a proposal designed to secure the safety of employees without jeopardizing their employment. While the effect ultimately may touch upon the employer's assignment, the nature and thrust of the proposal is directed at safety and as such the proposal is permissible.

The union also proposes that when VDT type equipment is introduced that the employer train existing employees on the basis of seniority. The employer again argues that this proposal interferes with its right to train and develop employees while the union argues that this is a matter of job security.

In our view by compelling the employer to train employees the union's proposal interferes with the employer's right to determine "training and development" under Section 18. The nature and thrust of the article is to compel training and as such goes too far in infringing upon the employer's right to train. This is

not a situation where there is a training program in place and the union for job security purposes seeks preferential treatment for affected senior employees, rather the article compels a training program for employees in general, based on seniority. As such the proposal infringes section 18 and is disallowed.

The final proposal under job security poses a problem of a different dimension. The union's proposal seeks to change the present probationary period from one year to three months. The employer submits that the proposal interferes with the discretion of the Civil Service Commission under Section 7 of *The Public Service Act*, R.S.O. 1980, c. 418. That section provides as follows:

6. - (1) *When a vacancy exists in the classified service, the deputy minister of the ministry in which the vacancy exists shall nominate in writing from the list of eligibles of the Commission a person to fill the vacancy.*

(2) *The Commission shall appoint the person nominated under subsection 1 to a position on the probationary staff of the classified service for not more than one year at a time. R.S.O. 1970, c. 386, s. 6; 1972, c. 1, s. 2.*

The union submits that the proposal does not interfere with the employer's discretion to impose a probationary period but merely limits the duration of that period.

In our view, the discretion of the Commission extends to both the appointment and the duration of the appointment. The Civil Service has an extensive variety of positions and occupations requiring many different skills and qualifications. The opportunity to consider potentially permanent employees in these different jobs is an important feature of the employer's discretion. The legislature has provided the employer with a period of not more than one year to consider these potentially permanent employees. Also under Section 18 (a) the employer has the right to determine "employment" as well as appointment.

Clearly, then the proposal by the union encroaches upon the right to determine appointment. The intention of the legislature, in our view, after reading the relevant legislation is to give the employer the right to hire or employ and that right may be exercised after the employer has considered the on-the-job performance of the probationary employee. Since the employer is given a clear discretion by the legislature in determining the probationary period for up to one year it is our view that the nature and thrust of the proposal submitted by the union fetters that discretion and interferes with the employer's right to make an assessment of potentially permanent employees for periods it deems advisable. That power or right is given to the Commission

to exercise on a case-by-case basis and cannot be delegated to arbitration for determination. See e.g. *Durham Police Bd and Police Association*, 1980 28 OR 2d 1 at p. 5 (per MacKinnon A.C.J.O.)

The union proposes a pro-rated benefit for all employees on the unclassified staff pro-rated on the basis of the number of hours worked. That proposal is difficult to assess because the proposed benefits are not enumerated. The proposal is as follows:

Article 3, Seasonal or Part-Time Employees

The Union proposes that all employees in the Unclassified Staff be entitled to the same benefits as the Classified Staff pro-rated on the basis of the number of hours worked.

The employer submits that the union's proposals may infringe upon the employer's discretion under *The Public Service Act*. The relevant provisions of that Act are as follows:

1. (b) "classified service" means the part of the public service to which civil servants are appointed;

(i) "unclassified service" means the part of the public service that is composed of positions to which persons are appointed by a minister under this Act. R.S.O. 1970, c. 386, s. 1; 1972, c. 96, s. 1; 1973, c. 57, s. 19.

8.-(1) A minister or any public servant who is designated in writing for the purpose by him may appoint for a period of not more

than one year on the first appointment and for any period on any subsequent appointment a person to a position in the unclassified service in any Ministry over which he presides.

9. A person who is appointed to a position in the public service for a specified period ceases to be a public servant at the expiration of that period. R.S.O. 1970, c. 386, s. 9.

REGULATION 749

5.-(1) The unclassified service is divided into the following groups:

1. Group 1, consisting of employees who are employed under individual contracts in which the terms of employment are set out and who are employed,
 - (a) on a project of a non-recurring kind;
 - (b) in a professional or other special capacity;
 - (c) on a temporary work assignment arranged by the Commission in accordance with its program for providing temporary help;
 - (d) for twenty-four hours or less during a week; or
 - (e) during their regular school, college or university vacation period or under a co-operative educational training program.
2. Group 2, consisting of employees employed on a project of a seasonal or recurring kind that does not require the employees to be employed on a full-time, year round basis.
R.R.O. 1970, Reg. 749, s. 5 (1);
O. Reg. 38/71, s. 1.

The union submits that it is entitled to bargain about benefits that an employee shall receive during his employment.

On its face the proposal does not offend the provisions of *The Public Service Act* or the Regulations. The Act does not prohibit a pro-rata application of benefits to those on the unclassified staff. Thus for example the union may bargain for bereavement leave to be pro-rated or for salary or other monetary benefits for unclassified staff. The difficulty that may occur is in cases where the period of appointment set out in Sections 8 and 9 is affected. Section 8 sets out two types of appointment - a first appointment and a subsequent appointment. The first appointment is limited to one year whereas the second appointment is indefinite. Also Section 9 terminates the status of the employee as a public servant after the expiration of the period of appointment.

At this juncture, based on the written proposal filed, we find that nothing in the proposal infringes on the employer's power or right to appoint, nor is there anything that extends the time of appointment beyond the period in Section 9. We do not propose to speculate about proposals that have not been formulated except to say that there does

not appear to be anything that restricts the union's right to bargain about the terms and conditions of employment during the statutory period that a person is employed in the unclassified service. The proposal is allowed and amendments or refinements may be referred for further consideration.

The union has also proposed Article 18 which is a health and safety article and which provides that certain employees in mental retardation, psychiatric and correctional facilities will not be required to work alone. The employer submits that this provision restricts or infringes on its right to determine complement while the union claims that this is a safety proposal.

In our view the article does not interfere with the employer's right to determine the number of employees required in different situations except insofar as it seeks to impose a minimum requirement in a limited number of situations for safety purposes. This is not an infringement on the right to determine complement although it may touch on it. As such the proposal is permissible.

The union has submitted a series of pension proposals which the employer has rejected as properly falling under the prohibited area of superannuation referred to in Section 18(1)(b). The union submits

that pensions and superannuation are distinguishable. Based on the argument we perceive the distinction to be one that is without a difference. A pension is a periodic payment made by a government or employer in consideration of past service and we are unable to conclude that it differs from the superannuation allowance referred to in *The Public Service Superannuation Act*, R.S.O. 1980, c. 419. Indeed the union's proposal in Article 7(b) which permits "...an employer to back pension credits at any time on the basis of superannuation benefits service obtained with a previous public service employer" suggests that its concept of pension and superannuation and the application of those concepts are interchangeable. The proposal is therefore disallowed.

The most difficult issue to deal with concerns the union's proposal "to provide dental benefits to retirees..." and to increase the Long Term Income Protection for retirees. That issue concerns us not only because of the inherent difficulties in deciding the matter but also because that issue was dealt with previously in arbitration and by the Courts.

In an arbitration award under *The Crown Employees Collective Bargaining Act* between the *Liquor Control Board of Ontario et al* and *The Ontario Liquor Boards Employees'*

Union, October 1979, (M. Teplitsky), unreported, the majority of a board of arbitration faced with the issue of whether life insurance benefits for retirees could be improved found that the union could bargain this benefit for retirees as a term and condition of employment. The majority also concluded that retirees are not members of the bargaining unit and are not employees within The Act, rather they are former employees.

The employer applied for judicial review of the arbitration award. The Divisional Court sustained the award of the Board of Arbitration and found that the parties could negotiate for insurance benefits for retirees within the phrase "term and condition of employment".

The employer ~~appealed~~ to the Ontario Court of Appeal and that Court in the exercise of its discretion dismissed the appeal on the basis that the question should have been taken to this Tribunal. *Re Liquor Control Board of Ontario et al* and *Ontario Liquor Board Employees' Union et al* 33 O.R. 2d, 592.

This Tribunal which exercises general supervisory jurisdiction under Section 40(2) of The Act over bargaining matters that come before interest arbitrators is not bound

by decisions of those interest arbitrators where the parties have consensually attorned to the jurisdiction of the Board of Arbitration to decide the matter. The Tribunal by The Act is given the primary responsibility to determine whether matters come within the scope of collective bargaining and thus awards of boards of arbitration are not binding although they may by their reasoning be persuasive. It is desirable that the parties under this legislation place questionable matters before the Tribunal which is responsible for the day to day operation of The Act rather than ad hoc boards of arbitration which are called upon to resolve specific disputes. The Tribunal has specific and continuing responsibilities for The Act and is the designated and appropriate forum to determine questions involving intricacies of bargaining between the Provincial Government and its employees. *The Workmen's Compensation Board and The Canadian Union of Public Employees, Local 1750 et al*, April 2, 1981, unreported, (Divisional Court); *Re Liquor Control Board of Ontario et al* and *Ontario Liquor Boards Employees' Union et al* (Ct. App.), *supra*.

Apart from the plain language of The Act it is our view that the policy of The Act is intended to provide a narrower focus for bargaining than private sector collective bargaining legislation. While

the purpose of The Act which is to achieve harmonious relations between the employer and the unions representing employees may be best achieved by approximating collective bargaining in the private sector we are compelled to recognize that this Act differs from private sector bargaining legislation.

Generally private sector bargaining legislation leaves the substance of bargaining to the parties. There is no restriction on the subject matter of bargaining. Once recognition is achieved by the procedures under private sector legislation no limitations are placed on bargaining. And not only are the parties unfettered about subject matter but also they are unfettered about recognition. The parties are free to expand bargaining rights beyond the original certificate granting representation rights. See *Canadian Union of Industrial Workers, Gilbarco Employees' Union and Gilbarco Canada Ltd.* [1971] OLRB Rep. 155 at p. 157; *Re Sault Ste. Marie Board of Education and Canadian Union of Public Employees, Local 216*, (1974) 5 LAC 2d 179 at p. 181 (O.B. Shime). In that respect a union is able to achieve recognition for retirees through bargaining, unimpeded by legislation.

This policy of non interference with both the subject matter of bargaining and representation may usefully be compared with *The Crown Employees Collective*

Bargaining Act where there are obvious limitations on bargaining and no suggestion that the parties are free to permit the recognition of persons beyond the bargaining unit as originally determined. *The Crown Employees Collective Bargaining Act* unlike private sector collective bargaining statutes contains restrictions on the scope of bargaining and, supervises the actual scope and substance of bargaining and as such is comparable to other collective bargaining statutes covering public sector employees. See e.g. *Public Service Staff Relations Act* R.S.C. 1970 c. P-35. Where the legislature intended to grant open scope bargaining to public employees it has made its intention manifest. See *The School Boards and Teachers Collective Negotiations Act*, R.S.O. 1980 c. 464, s. 9.

Also the legislature has not cut retired public employees adrift. Again, unlike the private sector, it has statutorily ensured a superannuation allowance for retirees and made provision to adjust those benefits as well as including a review of the pension plan by a committee which includes representatives of the retirees. *The Public Service Superannuation Act; The Superannuation Adjustment Benefits Act*, R.S.O. 1980 c. 490. It is against this statutory background and the different legislative schemes that this legislation and its effect on the proposals must be examined.

First, retirees are not employees nor are they members of the bargaining unit. See e.g. *Cominco Pensioners Union, sub-local of the United Steelworkers of America; Local 651 and Cominco Ltd.*

[1979] 2 Can LRBR 322; *Allied Chemical and Alkali Workers of America, Local Union No. 1 v. Pittsburg Plate Glass Co. Chemical Division* 65 L.C. 22899 at 22904 (U. S. Sup. Ct.). The term employee is defined by The Act and does not extend to retirees. To do so would upset the balance of The Act's intricacies. Thus the employer could not claim that retirees should be counted in determining the percentages in representation matters under Section 4 of The Act. Also; the union could resist a claim by a retiree under Section 30 that it was not representing the retiree fairly.

Second, under Sections 4 and 5 of The Act the union becomes the bargaining agent for employees in the bargaining unit. Its representation rights are statutorily defined and do not extend to persons other than employees. There is no authority to voluntarily recognize the union as bargaining agent for retirees. The scheme of The Act perpetuates that concept throughout including the definition section. Section 7 of The Act specifically authorizes bargaining for the union once it is granted representation rights and thus, in our view, bargaining is intended for

employees represented by the union concerning terms and conditions of employment. We do not think that the word employment in the phrase, terms and conditions of employment, can be ignored and we do not think that the concept of employment extends to persons who are not employees under The Act. In sum the union cannot represent retirees nor extend the terms and conditions of employment to them.

Third, those cases in the private sector which have permitted bargaining for retired employees are correctly decided under a statutory policy that hesitates to interfere with the who and what of collective bargaining. Thus *Pulp and Paper Industrial Relations Bureau and Canadian Paperworkers Union* [1978] 1 Canadian L.R.B.R. 60 quoted with approval by the Divisional Court in *The Liquor Control Board of Ontario* case, *supra*, which determined that bargaining for retired employees was appropriate is consistent with a statutory policy of not limiting or interfering with the subject matter of bargaining. In the *Pulp and Paper* case the British Columbia Labour Relations Board said as follows at p. 79:

In our judgment, it is inconsistent with the objectives of the B.C. Labour Code to start this Board down that path of overseeing, even to this limited extent, substantive discussions of the parties at the bargaining table. In-

stead, the evolution of the subjects of collective bargaining should be the result of pragmatic accommodations worked out by unions and employees in their individual relationships, responding to the nuances of their own situations. We have been dealing here with a situation where the trade-union wants to extend the reach of its collective agreement into an area which the pulp and paper industry up to now has considered to be none of the Union's business. ...The whole point of a system of free collective bargaining is to leave it to the parties to work out their own boundary lines between the area of mutual agreement and the area of unilateral action, whether the action be taken by the employer or by the union. And in the final analysis, the test of whether a particular objective is sufficiently pressing to one party to have moved into the area of mutual agreement is the price that that party is willing to pay for such a move: either by concessions elsewhere in the contract or by the losses inflicted by a work stoppage. The wrong method is to rely on rigid controls, administered by an external tribunal, with the risk this poses that the ebb and flow of the collective bargaining regime might be frozen into the currently conventional pattern.

That case may usefully be compared with the restrictions placed on bargaining which this Tribunal is required to oversee and supervise.

Fourth, there are statutory provisions ensuring superannuation and review of benefits for retirees. The employees in the private sector do not have the benefit of a legislative assurance of pensions or superannuation allowance; generally inferior benefits in this area exist

in the private sector and it is questionable whether the legislature having statutorily enshrined this benefit for retirees intended that retiree benefits be further dealt with by negotiation and arbitration. We are hesitant to attribute an intent on the part of the legislature to permit a board of arbitration to increase or improve retiree benefits particularly where there is specific legislation in force dealing with a retirees entitlement. Legislation is the appropriate method for dealing with retiree benefits and not negotiation and arbitration.

To this point, we have dealt with the legislation, its differences and its limitations and we now turn to the decision of the Divisional Court in the *Liquor Control Board* case. On the face of the decision, it does not appear that the Court fully considered the statutory distinctions and policies that exist in various pieces of collective bargaining legislation. Nor does the separate superannuation legislation appear to have been considered by the Court. The Divisional Court referred to a number of cases which, with respect, we do not think permit us to extend bargaining rights to the union for retirees.

In Re Metro Toronto Police Ass. and Board of Commissioners of Police for Metropolitan Toronto 1980
28 O.R. 2d 624 111 D.L.R. (3d) 658, The Divisional Court determined that **survivor's benefits** to the surviving spouse or, if none, to the dependent children of uniform branch employees who die from injuries received or illness incurred in the performance of their duties was "...a benefit to members of the police force to provide for the discharge of their obligations to their dependents..." Clearly in that case while the Court found that non employees would benefit it also recognized that such a provision was a direct benefit to the existing employees.

In that connection it is important to note that there is nothing in The Act which would prevent current employees in certain cases, from bargaining for improved benefits for them, upon their retirement. Bargaining generally, contemplates a total wage package and the allocation of part of the wage package to different benefits for current employees is perfectly permissible. Such benefits would include benefits for dependents since that is a direct benefit for active employees. For example the employees might chose to have a part of their wage package allocated to benefit their dependents rather than receive the money in the form of wages, thereby saving the employees from making individual arrangements.

The allocation of benefits in this way is a direct benefit to the employee who otherwise would be required to make individual arrangements. But that type of arrangement is not what the union seeks in this case, rather it is seeking to extend benefits to retirees, which are not direct or immediate benefits to the current employees.

We note also, that survivor benefits to widows and children are provided for under *The Public Service Superannuation Act*, which again suggests that the legislature rather than negotiation and arbitration may be the more appropriate forum for dealing with retirees' benefits.

In *Re Blouin Drywall Contractors Ltd. and United Brotherhood of Carpenters and Joiners of America*, Local 2486 (1975) 8 O.R. (2d) 103, 57 DLR (3d) 199 the Court of Appeal determined that a board of arbitration could properly award compensation to members of the union where a company had hired non union carpenters to perform work which was the work of carpenters within the jurisdiction of the bargaining unit and the union. With respect to the issue of whether non employee members of the union could benefit from negotiation and arbitration the Court recognized the particular nature of the construction industry and that the statute did not prohibit the negotiating parties from conferring rights or benefits on non employee members of the union. Brooke, J.A. stated the following at p. 8:

While ss. 37(9) and 42 of the Labour Relations Act do not extend the binding effect of a collective agreement or arbitration award made pursuant thereto beyond "employees", I do not regard these sections as prohibiting the negotiating parties from agreeing to confer rights or benefits on non-employee members of the union and that such rights and benefits may then be the subject of grievance procedure and within the jurisdiction of an arbitration board under the agreement. Collective agreements in this industry have developed to include benefits to non-employees who are union members. In this industry, there is no continuing employment and so collective agreements have developed to ensure a source of labour to the contractor, to provide for preference in the employment of trade union members and, while establishing the terms and conditions of such employment, to provide other benefits which may become due or payable at a time when the union member is not employed.

Relevant to this case is the fact that s. 38(1)(a) of the statute contemplates the employer's covenant to give preference in hiring the union members. That section says:

38(1) Notwithstanding anything in this Act, but subject to subsection 4, the parties to a collective agreement may include in its provisions,

- (a) for requiring, as a condition of employment, membership in the trade union that is a party to or is bound by the agreement or granting a preference of employment to members of the trade union, or requiring the payment of dues or contributions to the trade union;

No doubt the provision contemplated by the statute is, indeed, union security; but equally certain in my view is that it anticipates a covenant in favour of those who are union members, unemployed and available and qualified to do the work, which covenant should be enforced in their favour.

The Court also recognized that granting relief to non-employee members in this industry for a breach of the type committed by the employer was the only appropriate way to remedy the breach. Thus the Court expressly concluded that the private sector statute, namely the *Labour Relations Act* did not prohibit conferring benefits on non-employee members of the union whereas in our case that very threshold issue cannot be dealt with in the same way because of the limitations under The Act.

But even more important is the decision of the Supreme Court of Canada in *International Longshoremen's Association, Local 273 et al v. Maritime Employers' Association et al* 1979 S.C.R. 120, 89 D.L.R. (3d) 289, 23 N.B.R. (2d) 458 where the Court determined that in a hiring hall situation, members of the employers association and members of the union locals, for the purposes of collective bargaining and labour relationships under the collective agreements "were respectively employers and employees". Thus the relationship was defined by the very nature of the industry and there was no question or issue whether certain people were employees capable of benefiting from the terms and conditions of employment. That is quite unlike the issue in the *Liquor Control Board* case where it was admitted that retirees were not employees. That is a matter which is highly

relevant since in our view a term or condition of employment may only apply to employees.

The issue cannot be resolved by asking simply whether benefits for retirees are capable of being terms or conditions of employment. One must go further and determine whether they are terms and conditions of employment contemplated by The Act and for which the union has the right to bargain. The union has the right to bargain for employees who under The Act are Crown Employees as defined in *The Public Service Act* and that Act defines a Crown employee as "a person employed in the service of The Crown or any agency of The Crown..." *The Public Service Superannuation Act*, as well as the concept of a retiree, indicates that a retiree is not "employed in the service" and cannot be represented by the union. The definition of employee in this regard is very different from the definition of employee in the *Labour Relations Act*. Therefore the differences in the legislation must be taken into account particularly in determining what is a term of employment and whether the union has the right to represent retirees.

Our determination in that regard with respect to Article 56 concerning the dental benefits also applies to


the union's proposal to increase long-term income protection for retirees subject to two comments. First, while one of the enumerated benefits which is listed in Section 7 the clear reference in the legislation is that the bargaining is for "...benefits pertaining to time not worked by employees including paid holidays, paid vacations, group life insurance and long-term income protection insurance". Thus the benefit is conditioned on a person being an employee and in the context of paid holidays and vacations, etc. long-term income protection insurance appears to be a benefit for active employees and not retirees.

Second, an amendment was made in 1975 to the *Public Service Superannuation Act* to enhance the position of those on long term disability which again suggest that improvements are to be made for retirees through legislation rather than arbitration.

In summary, the cases referred to by the Divisional Court must be considered in the light of the particular statutes and statutory policies and in the light of the particular facts and issues decided and do not in our view compel a conclusion that retirees' benefits are terms and conditions of employment for which the union may bargain under The Act. Therefore

the proposals affecting retirees are prohibited only insofar as they attempt to deal with persons who are not currently employed. Bargaining for retirement benefits for current employees is however permissible.

DATED at Toronto, Ontario this 17th day of May, 1982.

A handwritten signature in cursive script, appearing to read 'O. B. Shime', written over a horizontal line.

O. B. Shime, Q.C.
for the Tribunal

/lb

These distinctions do not, however, indicate to me that bargaining with respect to retirement benefits is allowed under one piece of legislation but not under the other. I am led to this conclusion by a comparison of the provision of the two Acts. Both similarly restrict representation rights to "employees" a term which under neither Act could be said to include retirees. In its reasons, the majority has referred to sections 4 and 5 of the Crown Employees Collective Bargaining Act wherefrom they glean a restriction on bargaining rights. The operative part of these sections state:

"The tribunal shall grant representation rights to the employee organization as the bargaining agent of the employees in the bargaining unit."

I find no material difference in the effect of this language from that found in section 7(3) of the Labour Relations Act wherein it is stated that:

"The Board shall certify the trade union as the bargaining agent of the employees in the bargaining unit."

Other provisions of the Labour Relations Act also imply that representation rights for a union are restricted to "employees". In particular, I would refer to section 1(b) of the Act wherein "bargaining unit" is defined as follows:

"Bargaining unit" means a unit of employees appropriate for collective bargaining whether

it is an employer unit or a plant unit or a sub division of either of them".

Both pieces of legislation, therefore, contemplate that representation rights extend only to employees of the employer. This limitation, has not in the private sector precluded unions from bargaining with respect to rights and benefits for various groups of individuals who cannot be described as employees. This would include such things as health and welfare benefits for family members of employees, retroactive wage increases for former employees, interview rights for future employees, rights to attend meetings for union officials, rights of re-employment for terminated or laid off ex-employees and rights to retirement benefits for retired employees. In my view, there is no reason why such matters are not similarly appropriate for collective bargaining under the Crown Employees Collective Bargaining Act.

The majority has suggested that the provisions under the Labour Relations Act allowing for voluntary recognition of a union and the lack of such provisions under the Crown Employees Collective Bargaining Act is a significant distinction. In my view, this is not the case in that as previously stated both Acts implicitly limit representation rights to employees only, whether granted through certification or through voluntary recognition. Further, bargaining for retirees and other non-employees in the private sector is not subject to an extension of the recognition clause in the collective agreement

to include these individuals. Similarly, under the Crown Employees Collective Bargaining Act it would not be necessary for the retirees to be part of the bargaining unit for them to acquire benefits under the Act.'

In my view, the issue of matters appropriate for collective bargaining in both the private and public sectors is separate and distinct from the issue of bargaining representation right. On this second issue, that is matters appropriate for collective bargaining, there is a major distinction between the Labour Relations Act and the Crown Employees Collective Bargaining Act. This, as pointed out in the reasons of majority is the restrictions set out in section 18 of the Crown Employees Collective Bargaining Act wherein certain matters are precluded from collective bargaining. The majority also appears to view section 7 of this Act as restricting the appropriate matters for a collective bargaining to those matters directly effecting employees. With this view, I disagree. Section 7 should rather be seen as a permissive section which gives to the union the right to bargain with respect to all terms and conditions of employment except as explicitly precluded by section 18. Again, in a comparision between the provisions of the Crown Employees Collective Act and the Labour Relations Act, I find no material difference in the scope of bargaining except for section 18. Section 7 of the former Act states as follows:

"Upon being granted representation rights, the employee organization is authorized to bargain

with the employer on terms and conditions of employment except as to matters that are exclusively the function of the employer without under section 18(1)."

The Labour Relations Act similarly provides to unions granted representation rights under that Act, the right to bargain with respect to terms and conditions of employment. This is accomplished through section 15 of the Act which imposes on both parties the obligation to bargain and to make every reasonable effort to make a collective agreement. Sub section (11)(e) of the Act then defines collective agreement as:

"An agreement in writing between an employer or employer organization, on the one hand, and a trade union that, or a counsel of trade unions that, represents employees of the employer or employees of members of the employer organization, on the other hand, containing provisions respecting terms or conditions of employment or the rights, privileges or duties of the employer, employer organization, the trade union or the employees, and includes a provincial agreement."

In that, the provisions of both Acts provided similar scope of bargaining, except for specific exclusions under the former Act, and in that it is recognized that retiring benefits is an appropriate matter for bargaining under the Labour Relations Act, such a matter cannot be precluded by the Crown Employees Collective Bargaining Act unless it is explicitly mentioned in section 18(1).

There is no suggestion that this is the case.

In support of its restrictive interpretation of the Crown Employees Collective Bargaining Act the majority has referred to and relied on the provisions of the Public Service Superannuation Act and the Superannuation Adjustment Benefits Act to suggest that legislative reform rather than negotiations is the proper procedure for the union to pursue in an attempt to modify retiree benefits. I do not find this suggestion persuasive.

The provisions of these Acts deal with a very specific subject matter; that is superannuation. These provisions are of benefit to those already retired as well as current employees upon their retirement. Presumably, it is because superannuation is dealt with specifically in that legislation that the parties are specifically precluded from bargaining on the subject by sub section 18(1) of the Crown Employees Collective Bargaining Act. However, there are many benefits which might be the subject of negotiation for retirees which are not covered by the Superannuation Act. These include the dental benefits which are the subject matter of a specific proposal being considered by this tribunal. This type of benefit is not excluded from bargaining by section 18 and is in fact recognized by the majority in its reasons as an appropriate subject matter for negotiations to the extent that


it would apply to current employees upon their retirement. It must then also be an appropriate matter for bargaining, for those already retired unless specifically excluded by section 18.

Not being persuaded by the reasoning of the majority, I am compelled to accept the analysis of the retiree benefit issue set out in the arbitration award between the Liquor Control Board of Ontario et al and the Ontario Liquor Board Employees Union, October 1979 referred to in the majority decision as well as by the reasons of the Divisional Court which sustained that award. Retiree benefits is clearly a matter which is a term or condition of employment which comes within the purview of the Act as an appropriate matter for collective bargaining. I am in particular agreement with the statement of the Divisional Court found at page 708 of their decision wherein they say:

"Where the legislature has taken away the right to freely bargain collectively and the right to strike to enforce their demands, the Act should be interpreted liberally."

In my respectful view, the majority has reached a strained interpretation of the legislation, which unreasonably restricts the bargaining rights of the union on this issue.

I must also register my dissent to the majority decision with respect to the length of the probationary period proposal. In my view, the only impact of section 7 of The Public Service Act is to prohibit a proposal which would increase the probationary period to more than one year. This would require an amendment to The Public Service Act and is therefore precluded by section 14 of the Crown Employees Collective Bargaining Act. Aside from this, the length of the probationary period is a job security issue which is bargainable under section 7 of the Crown Employees Collective Bargaining Act. It is of course still open to the parties to bargain different probationary period for the variety of positions involved to reflect the differing features of these positions.



Member of the Board
Elizabeth McIntyre

ONTARIO PUBLIC SERVICE LABOUR RELATIONS TRIBUNAL

T/32/81

BETWEEN: Ontario Public Service Employees Union Applicant

- And -

The Crown in Right of Ontario Respondent

BEFORE: O.B. Shime, Q.C., Chairman and
J.H. McGivney, Q.C. and
E. McIntyre, Tribunal Members

APPEARANCES AT THE HEARING: C. Paliare, Counsel & others,
for the Union
C.G. Riggs, Counsel & others,
for the Employer

DATE OF HEARING: February 26, 1982

DECISION OF THE TRIBUNAL

After considering the proposals and submissions
the Tribunal's decision with respect to the proposals
submitted by the union are as follows:

1. Article 56, Dental Plan

- (c) Amend Article 56.1 to provide
dental benefits to retirees
and amend Article 56.4
accordingly.

Proposal Prohibited

3. Article 24, Job Security

- (c) Amend those sections of the article dealing with retraining to provide that affected employees will be retrained in a position in the Ontario Public Service for one (1) year at the Employer's expense. Proposal Allowed
- (d) The parties agree that
(iii) employees' work performance on such equipment will not be monitored by the equipment itself. Proposal Prohibited
- (d) VDT-type equipment will be
(iv) used only in rooms properly designed for the purpose and having lighting, furniture and wall colours and ventilation specifically designed to provide maximum protection to the equipment operators. Such standards to be approved by a committee of the Union. Proposal Allowed
- (d) Women of child-bearing age
(viii) shall be provided with all available information about the health hazards of VDT-type equipment, proven or theoretical, before being assigned to VDT-type equipment and any refusal thereafter to work on such equipment shall in no way jeopardize their employment. Proposal Allowed
- (d) When VDT-type equipment is introduced into the work-place, the
(ix) Employer agrees to train existing employees in its use on the basis of seniority. Proposal Prohibited
- (d) Add a new article to provide for
(x) changing the present probationary period of up to one (1) year to "up to three (3) months". Proposal Prohibited

6. Article 3, Seasonal or Part-Time Employees

The Union proposes that all employees in the Unclassified Staff be entitled to the same benefits as the Classified Staff pro-rated on the basis of the number of hours worked. Proposal Allowed

7. New Article, Pensions

(a) Reduce the 90 factor to provide for years of service plus age factor of 80. Proposal Prohibited

(b) Insert a new article to permit an employee to buy back pension credits at any time on the basis of superannuation benefits service obtained with a previous public service Employer. Proposal Prohibited

(c) A new article to provide that seventy-five percent (75%) of an employee's pension be paid to the surviving beneficiary. Proposal Prohibited

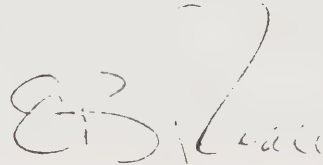
9. Article 18, Health and Safety

(b) Add a new article to provide that no employee will be required to work alone on a ward or related area at any time with a patient/client/inmate in a mental retardation/psychiatric/correctional facility. Proposal Allowed

The Tribunal's decision is based upon the proposals submitted. While some submissions have been made that go beyond the drafted proposals after due consideration the Tribunal has decided that in the absence of exact language it is not prepared to speculate

about other possible proposals or amendments to the instant proposals.

DATED at Toronto, Ontario this 3rd day of May, 1982.

A handwritten signature in dark ink, appearing to read 'O. B. Shime', is written above a horizontal line.

O. B. Shime, Q.C.
for the Tribunal

/lb

ONTARIO PUBLIC SERVICE LABOUR RELATIONS TRIBUNAL

T/32/81
(Interim)

Between: Ontario Public Service Employees Union

Applicant

and

The Crown in Right of Ontario

Respondent

Before: O. B. Shime, Q.C. - Chairman
E. McIntyre - Member
J. H. McGivney - Member

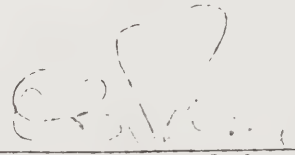
APPEARANCES AT THE HEARING:

C. Paliare, Counsel & others
for the Union
C. G. Riggs, Counsel & others
for the Employer

INTERIM DECISION OF THE TRIBUNAL

The Tribunal requests clarification in writing of the union's proposals prior to making a final decision and the Tribunal will continue to remain seized of the matter pending receipt of the clarified proposals.

Dated at Toronto, Ontario
this 27th day of May, 1982.



O. B. Shime, Q.C.
for the Tribunal

/et

ONTARIO PUBLIC SERVICE LABOUR RELATIONS TRIBUNAL

T/32/81

BETWEEN:

Ontario Public Service Employees
Union

Applicant

- And -

The Crown in Right of Ontario

Respondent

BEFORE:

O.B. Shime, Q.C., Chairman and
J.H. McGivney, Q.C. and
E. McIntyre, Tribunal Members

APPEARANCES AT THE HEARING:

C. Paliare, Counsel & Others,
for the Union
C.G. Riggs, Counsel & others,
for the Employer

DATE OF HEARING:

June 21, 1982

DECISION OF THE TRIBUNAL

This is a continuation of an application made under Section 40(2) of The Crown Employees Collective Bargaining Act to determine whether certain proposals put forth by the Union come within the scope of collective bargaining under the Act.

Initially this Tribunal had approved a proposal to prorate benefits for all employees in the unclassified staff. As a result of certain submissions made before the Board of Arbitration dealing with working conditions, the matter was again referred to this Tribunal, and the Tribunal requested clarification of the Union's proposals.

The Union has now submitted a series of proposals which divide into three areas, only one of which is contentious.

The first part of the proposal concerns the Union's request to modify certain Articles in the Collective Agreement so that they apply to the unclassified staff, and the employer does not dispute the jurisdiction of the Board of Arbitration to deal with those matters. The second area concerns Article 25 of the Collective Agreement, and the Tribunal merely notes that there is some difference between the parties as to its interpretation.

The remaining proposal concerns Article 24 of the Collective Agreement. Insofar as that proposal is concerned, the Tribunal confirms its oral decision that seniority cannot

be applied so as to extend the period of appointment beyond the period contained in The Public Service Act. Thus, for example, an employee whose appointment terminated on September 30, 1982 could not utilize the seniority provisions so as to bump into another job held by an unclassified employee, thereby extending the period of appointment beyond the September 30 termination date.

However, as this Tribunal indicated at the Hearing, the Act specifically permits bargaining concerning the "reappointments of employees". There is nothing in the Act which would cause us to infer that the legislation was intended to cover reappointments made during the initial term of appointment, and, indeed, there does not seem to be any other limitation or qualification on the right to bargain for reappointment in The Crown Employees Collective Bargaining Act. The only limitation that appears to exist is that contained in Section 8(1) of The Public Service Act which provides as follows:

" A minister or any public servant who is designated in writing for the purpose by him may appoint for a period of not more than one year on the first appointment and for any period on any subsequent appointment a person to a position in the unclassified service in any Ministry over

which he presides."

That section has not been repealed and accordingly must be read in connection with The Crown Employee's Collective Bargaining Act. It therefore appears that the only limitation in dealing with reappointments is the period of reappointment which is in the discretion of the minister or his designee and, thus, as in the case of an appointment, an unclassified employee may not utilize seniority to extend the period of reappointment.

The Tribunal will remain seized of this matter should any further difficulties arise.

DATED at Toronto, Ontario this 28th day of July 1982.

"O.B. Shime"

O.B. Shime, Q.C.
for the Tribunal

ONTARIO PUBLIC SERVICE LABOUR RELATIONS TRIBUNAL T/32/81

BETWEEN: Ontario Public Service Employees
Union
Applicant
- and -
The Crown in Right of Ontario
Respondent

BEFORE: O.B. Shime, Q.C., Chairman and
J.H. McGivney, Q.C. and
E. McIntyre, Tribunal Members

APPEARANCES AT THE HEARING: C. G. Paliare, Counsel & Others,
for the Union
C. G. Riggs, Counsel & Others,
for the Employer

DATE OF HEARING: June 21, 1982

DECISION OF THE TRIBUNAL

In this matter, the employer requests that the Tribunal reconsider, clarify and vary its decision pursuant to its authority under section 39 of *The Crown Employees Collective Bargaining Act*.

More particularly the employer asks that the Tribunal reconsider its decision with respect to the meaning of the term reappointment, and the employer further suggests that "the term

'reappointment' is used in the sense of recall from layoff."

The union submits that the Tribunal does not have jurisdiction to reconsider its award and also that section 39 of the Act does not permit a party to reargue its case. Alternatively, the union claims that there is no limitation in bargaining about reappointments.

Having regard to the submissions of the parties and after considering our earlier decision with respect to this matter we are satisfied that our earlier decisions in this matter properly reflect the intent of the Tribunal and do not require reconsideration or clarification nor do we think that we should vary the decision. Accordingly, it is not necessary to deal with the argument raised by the union concerning our jurisdiction under section 39 or the grounds upon which we should exercise that jurisdiction.

Section 7 of *The Crown Employees Collective Bargaining Act* gives the union the authority to bargain about "layoffs or reappointments" of employees. Section 18 gives the employer... "the right to determine. ... appointment.." Thus, under *The Crown Employees Collective Bargaining Act* there does not appear to be any inconsistency--the employer may determine appointments and the union may bargain about reappointments without interfering with the employer's exclusive function.

Section 8(1) of the *Public Service Act* gives a Minister or his/her designee the power to appoint a person to the unclassified service for a period of not more than one year. That provision appears to us to be an extension or example

of the employer's authority under section 18 of *The Crown Employees Collective Bargaining Act* and need not create any bargaining difficulties between the employer and the union.

However, section 8(1) of the *Public Service Act* gives the Minister the power to appoint a person to the unclassified service "for any period on any subsequent appointment." Thus an issue arises as to whether the union's authorization to bargain about reappointment conflicts with the Minister's authority to make subsequent appointments.

In our view, it would be drawing too fine a linguistic line to suggest that there is a distinction between a reappointment and a subsequent appointment. But in any event, we do not think that there need be a conflict between the Minister's right to make a subsequent appointment and the union's authority to bargain about reappointments.

In Durham Regional Police Association v. Durham Regional Board of Commissioners of Police , November 23, 1982, the issue arose as to whether an interest arbitrator could make an award concerning the reimbursement of an acquitted police officer for legal expenses incurred in defending a statutory or criminal charge in the face of an explicit provision in the *Police Act* granting the council of the municipality complete discretion to pay damages or costs incurred in criminal proceedings by a member of the police force. The Supreme Court of Canada found that notwithstanding such unfettered discretion, collective bargaining was not ousted with respect to that particular matter.

The Court noted that there existed a power in the Lieutenant-Governor-in-Council to exclude from the scope of working conditions provisions like the disputed condition but that such action had not been taken. If anything, the union's position in the present case is stronger, by virtue of the fact that the legislature not only has taken no action to place the right to re-appoint or make subsequent appointments within the scope of matters that fall within the exclusive function of the employer but has gone to the other extreme and granted the union the right to bargain about reappointments under section 7 of the Act.

Also, we are of the view that there is no incompatibility or inconsistency between the proposals and section 8 of the *Public Service Act*. In the Durham case, the court referred to the case of a local union Number 1432, International Brotherhood of Electrical Workers v. Town of Summerside (1960), S.C.R. 59, where the municipality relied upon a special provision of a by-law of the *Act of Incorporation* which which stated as follows:

The salaries of Town Officials, Firemen and all other Employees of the Town shall be such as the Town Council may from time to time determine and fix by resolution, and they shall remain in office during the pleasure of the Council and should any vacancies occur, the Council may appoint others to take their place at any meeting of the Council.

That case is of interest because the statutory by-law relied upon by the municipality gave Council the right to remove employees from office and to appoint others. Ritchie J., speaking for the Court, held that there was no repugnancy between the powers said to be reserved to the municipality and the obligation to bargain collectively. By analogy, it is our view that there is no

repugnancy between the powers granted to the Minister or his designee under the *Public Service Act* and the right of the union to bargain about reappointment under section 7.

We are also of the view, despite the able argument of counsel for the employer, that the term reappointment in section 6 is not the equivalent of recall, as that term is generally understood in collective bargaining although there may be cases where reappointment and recall are the same thing. The use of the term reappointment in our view is broad enough to include the concept of "subsequent appointment" as that phrase is understood under section 8 of the *Public Service Act*, and we see no need to limit the use of the term reappointment as was suggested.

For all these reasons, the request for reconsideration is denied.

DATED at Toronto, Ontario this 16th day of November , 1983.

"O. B. Shime"

O.B. Shime, Q.C., Chairman
for the Tribunal

ch

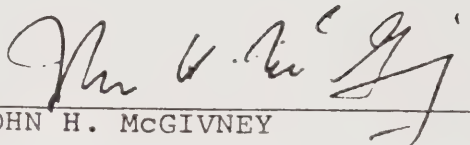
DISSENT

The Tribunal is required to interpret the term "lay-offs or reappointments" in Section 7 of The Crown Employees Collective Bargaining Act. That term became a part of Section 7 as a consequence of the 1974 amendments which conferred on the bargaining agent the power to bargain with respect to "lay-offs and reappointments." Section 8(1) of the present Public Service Act gives the Minister the power to "appoint for a period of not more than one year on the first appointment and for any period on any subsequent appointment" which provision was in the Public Service Act prior to the 1974 amendments to The Crown Employees Collective Bargaining Act.

In the majority view, the 1974 amendment to Section 7 nullifies the Minister's discretion in Section 8(1) of the Public Service Act with respect to reappointments. Clearly, there is a conflict between the two provisions. My dissent is based on the view that given the affinity of the two Acts and their legislative history and in the absence of clear language, it is unnecessary to read into the 1974 amendments to Section 7, the intention on the part of the legislature that that amendment prevail over Section 8(1) of the Public Service Act as it relates to reappointments. I favour the view that both provisions be operative but that the meaning of each be modified to eliminate the conflict by adopting the position urged by the employer's counsel that

"reappointments" in Section 7 be read and be interpreted to mean recall from lay off.

DATED the 15th day of November, 1983.



JOHN H. MCGIVNEY

T/32/81

BETWEEN: Ontario Public Service Employees
Union (Vincent Drakes) Applicant

- and -

The Crown in Right of Ontario Respondent

BEFORE: O.B. Shime, Q.C., Chairman and
J.H. McGivney, Q.C., and
C. Jecchinis, Tribunal Members

APPEARANCES AT THE HEARING: W. Lokay, Union Representative
D. Brown, Q.C. for the Employer

DATE OF HEARING: November 16, 1982

DECISION OF THE TRIBUNAL

Having regard to the submissions of the parties, and for the reasons given orally, the Tribunal determines that Mr. Vincent Drakes is not employed in a managerial or confidential capacity within the meaning of the Act and accordingly is an employee for the purpose of the Act.

Dated at Toronto, Ontario this 16th day of November, 1982.



O.B. Shime, Q.C., Chairman
for the Tribunal



Ontario Public Service
Labour
Relations
Tribunal

Fonction Publique de l'Ontario
Tribunal Administratif
des Relations
du Travail

180 Dundas Street West, Suite 2100, Toronto, Ontario M5G 1Z8

416/598-0688

T/0022/82

Crown Employees Collective Bargaining Act

R.S.O. 1980, c.108

ONTARIO PUBLIC SERVICE LABOUR RELATIONS TRIBUNAL

Between:

OPSEU (Shu-Tsing Cheng)

Complainant

and

The Crown in Right of Ontario
(Ministry of Natural Resources)

Respondent

Before:

M.G. Mitchnick	-	Alternate Chairman
D. Bonazzo	-	Member
R.M. Drennan	-	Member

For the Complainant:

D. Zimmer
Counsel
Breithaupt, Zimmer
Barristers and Solicitors

For the Employer:

M.M. Fleishman
Counsel
Ministry of the Attorney General

Hearing:

April 26, 1988

DECISION

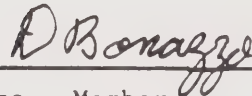
Upon consent of the parties, the Tribunal hereby orders that:

1. Letter dated May 25, 1982, from Ministry of Natural Resources, Fred Dawson, Manager, Cartography, be removed from Grievor's employment record.
2. Grievor receive wages for 2 1/4 hours improperly deducted on May 25, 1982.
3. Executed letter dated November 10, 1987, from Leslie M. McIntosh, Counsel, Ministry of the Attorney General, be placed in Grievor's employment file.

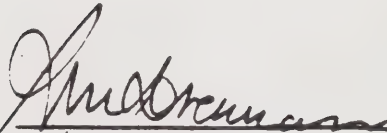
DATED at Toronto, Ontario this 26th April, 1988.



M.G. Mitchnick - Alternate Chairman



D. Bonazzo - Member



R.M. Drennan - Member

BETWEEN: Chaim Forer

Complainant

- and -

The Ontario Public Service Employees Union

Respondent

BEFORE: Owen B. Shime, Q.C. Chairman
E. McIntyre and J. H. McGivney, Tribunal Members

APPEARANCES AT THE HEARING: Chaim Forer (for Himself)
I. Freedman and S. Laycock
for the Union

DATE OF HEARING: March 15, 1983

DECISION OF THE TRIBUNAL

This is an application pursuant to Section 16(2) of *The Crown Employees Collective Bargaining Act, R.S.O. 1980, c.108* wherein the applicant objects to the payment of union dues because of his religious convictions.

Having regard to the evidence and to the submissions of the parties and for reasons given in Van Harten v. OPSEU, July 5th, 1976 unreported, it is our view that the order should be granted. The evidence in this case is readily distinguishable from the evidence in Boulakia, 1983, unreported (Ontario Labour Relations Board) and falls well within the principles enunciated by this Tribunal in previous decisions when exemptions were granted.

Accordingly, we order that the provisions of the collective agreement pertaining to the payment of dues or contributions to the respondent employee organization do not apply to the applicant and he is not required to pay dues or contributions

to the Ontario Public Service Employees Union and that the amounts equivalent thereto are to be remitted by the employer to a charitable organization. If the parties are unable to agree, then each should inform the Tribunal in writing and include therein any representations as to the charitable organization to be designated by the Tribunal.

DATED at Toronto this 7th day of April, 1983.

"O. B. Shime"

O.B. Shime, Q.C.
for the Tribunal

/ch

Between: OPSEU (Michael Blythe, et al)

Applicants

- and -

The Crown in Right of Ontario
(Management Board of Cabinet)

Respondent

Before: O. B. Shime, Q.C., Chairman
W. Walsh and L. Binder, Tribunal Members

Appearances at
the Hearing: W. Lokay for the Union
D. Nagel for the Employer

Hearing: June 15, 1983

This is an application pursuant to section 40(1) of The Crown Employees Collective Bargaining Act in which a question has arisen as to whether Michael Blythe and other persons who are seasonally employed and who perform tree planting/handling and related duties are employed within the meaning of section 1(1)(f) of The Crown Employees Collective Bargaining Act.

Michael Blythe was employed by the Ministry of Natural Resources in 1982 and 1983 during the tree planting season. Those occasions he worked in the Simcoe District from approximately mid April to mid May. He worked in a crew and his work included the hand planting and machine planting of trees as well as spraying. He was supervised by a resource technician who directed the crew. Mr. Blythe received an hourly rate and vacation pay.

Mr. Robert Grant was employed on the permanent staff in the Timmins District as a Resource Technician 3. He stated that the tree planting season varies from six to eight weeks and, during that time, several people are hired including crew bosses. There are usually eight or nine crews hired and many of the people return each year. The rates for tree planters are determined by district and in Timmins there is a piece work rate.

Mr. John Christian who has worked in various supervisory positions with the Ministry and is currently the regional forester for the Algonguin Region testified that he is the co-ordinator for six districts in the region and res-

possible for forest management. He stated that the Ministry hires a variety of people for the tree planting season which varies from two to eight weeks and depends on the weather. The turnover of employees varies from place to place, and the method of payment is determined by the size of the planting area.

The union maintains that the persons employed as tree handlers have an employment relationship with the Government and are included in the bargaining unit. The union maintains that they are full-time employees who work on a recurring basis. The employer maintains that the employees are temporary or casual employees and should be excluded.

The relevant provision of the Act is section 1(1)(f)(vi) which states that

"employee" means a Crown employee as defined in the Public Service Act but does not include...

- (vi) a person not ordinarily required to work more than one-third of the normal period for persons performing similar work except where the person works on a regular and continuing basis

In an arbitration award between the parties, the Board determined that for collective bargaining purposes

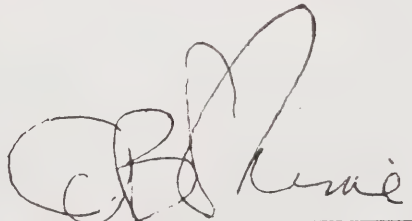
- (a) persons who work more than thirteen hours per week and
- (b) persons who work on a regular and continuing basis for thirteen hours per week or less are included in the bargaining unit. By and large this has been the rule of thumb by which the parties have operated.

There is no doubt that the persons with whom we are concerned are seasonal employees. Also, it is not necessary to

determine in this case whether they work "more than one-third of the normal period". For the purposes of this decision, it is sufficient that they be compared to persons "performing similar work". The employer suggests that these tree planters be compared to persons referred to as manual labourers; however, there is no evidence before us detailing the work performed by manual labourers. Rather, we are left to assume that manual labourers perform manual work as do the tree planters. But is there only one group of manual workers for comparison purposes? Do those persons work all year or are there groups of manual workers who work for lesser periods but who are included in the bargaining unit? Merely receiving the same rate of pay is not, in our view, sufficient to enable us to make the comparisons necessary in interpreting the statute. Thus, absent such evidence we are not prepared to exclude these persons as the employer has suggested.

In the result, we determine that persons who perform tree planting/handling and related duties are employees within the meaning of the Act.

DATED at Toronto, Ontario, this 3rd day of February, 1984.



O. B. Shime, Q.C.
for the Tribunal

Between: Robert Evans

Complainant

- and -

The Ontario Liquor Boards Employees' Union

Respondent

Before: O. B. Shime, Q.C., Chairman
E. C. Witthames & W. G. Wright, Tribunal Members

Appearances at the Hearing:

For the Grievor: M. Winterstein

For the Union: M. Levinson

For the Employer: M. P. Moran

Date of Hearing: October 3, 1983

DECISION

This is a complaint pursuant to section 30 of The Crown Employees Collective Bargaining Act which imposes on an employee organization the duty not to "act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees, whether members of the employee organization or not."

The complainant was dismissed from his employment. Subsequently, the union sought and received legal advice and was told that "his chances for success...before the Grievance Settlement Board are minimal or non-existent." The complainant was informed that the union had made the decision not to represent him and also advised him that he had the option of retaining

a representative or appearing on his own behalf.

The matter came on before the Grievance Settlement Board and for the reasons given by that Board in its decision dated July 20, 1982, the matter did not proceed.

The evidence adduced by the union indicated that it had reviewed the merits of the complainant's grievance and withdrew its support for him. The matter was discussed with the complainant by the union.

The complainant submits that the union acted in an arbitrary manner. The union submits that it considered all the relevant facts, that it obtained legal advice and that in all the circumstances its conduct was proper.

There is no suggestion that the union was improperly motivated towards the grievor and counsel for the complainant, quite properly, does not submit that the union's actions were discriminatory or in bad faith within the meaning of the Act.

The only basis for the complaint is that the union acted arbitrarily. In our view, the facts suggest otherwise. The union is not a guarantor or insurer for the employees; it must fairly represent them. In this case, the union did everything that was required of it in representing the grievor. It assessed his position and then decided to withdraw its support for the grievor. In this it was supported by a legal opinion. The union is not perfect. It may even be wrong without violating the provisions of the Act. At the very least, the union's conduct in this case was reasonable and, accordingly,

after assessing all the facts, we determine that the union's conduct as a whole, was not arbitrary. The application is, therefore, dismissed.

DATED at Toronto, Ontario, this 17th day of February, 1984.

"O. B. Shime"

O. B. Shime, Q.C.
for the Tribunal

ch

ONTARIO PUBLIC SERVICE LABOUR RELATIONS TRIBUNAL T/14/83

Between: Bill Williams, Arthur Lombard, Ed Morgan, Andy Pelletier
and John Abbott

Applicants

- and -

Ontario Housing Corporation Employees Union,
Local 767, C.U.P.E.

Respondent

Before: Owen B. Shime, Q.C. Chairman
C. Jecchinis and J. H. McGivney, Q.C., Tribunal Members

Appearances at the Hearing:

For the Applicants: S. D. Saxe, Counsel and others

For the Respondent Union: B. B. Fisher, Counsel and others

For Ontario Housing
Corporation: T. Sargeant, Q.C. and A. P. Tarasuk,
Counsel and others

Date of Hearings: November 16, 1983
December 28 & 29, 1983

This is an application pursuant to Section 24 of **The Crown Employees Collective Bargaining Act** in which the applicants seek to terminate the representation rights of the respondent union.

The applicant has filed a statement of desire in which the majority of the employees in the bargaining unit appear to have voluntarily signified in writing that they no longer wish to be represented by the respondent union.

The respondent union has filed a counter petition in which a significant number of employees have indicated a desire to be represented by the respondent union. There are a number of people who have signed both the documents filed by the applicant and the respondent union. This "overlap" of signatures on both documents is such that if we were to discount the names in the overlap or, in effect, treat the overlap names in the petition as a revocation of names in the application, then the applicant would not have enough signatures on the application which would constitute the support of a majority of the employees in the bargaining unit.

There is no doubt that the documents filed by the applicant, known as a statement of desire, and the counter petition, were originated and circulated by persons who are not members of management and there was no suggestion in the proceedings that either of the opposing documents was management inspired. There is also agreement that the signatures were proper in all other respects.

The only dispute in this matter concerns the impact or effect of statements made by the rival groups contending for employee support and whether the signing of the documents was brought about by improper statements made to the employees by these rival groups.

The first two statements are contained in letters sent to the employees by the president of the respondent union. They are as follows:

June 21, 1983

NOTICE TO GENERAL MEMBERSHIP M.T.H.A.

I guess by now that the majority of you have been visited by the great white knight in shining armour who goes by the name of Don Roach and his faithful steed Bill Williams (incidentally, the same Bill Williams who Roach continually made a turkey out of at virtually every membership meeting held in Toronto when he was in office), advocating the pull out of C.U.P.E. and joining some kind of other Union, which would of course be run by Roach (although his gullible supporters might actually think that they might have some say in this nightmare that he will call a Union) and on these visits, I would like to comment:

(1) These visits are complete desperation moves on Roach's part. Because of the poor turn out at his "save our souls meetings", he has realized that this membership is wise to him and will not attend these meetings to listen to his lies and propaganda.

(2) Some people have actually said to me, that Management is afraid of Don Roach and to which I answer:

Management not only has never been afraid of Don Roach, but was the best thing to ever happen to them (and being in the position that I am now (President) I fully understand what they mean) and in fact, if I was an owner of a company and had to deal with a Union, I would love to have Roach as the President because he has a one track mind: money, which right now the money he is after is yours about \$400,000.00 dollars worth and if he gets his way will cost you out of your pocket at least \$1,000.00.

I don't know about you, but I don't have that kind of money to give to him. But I will continue to do as I have done for the last 2½ years, have faith in you and know that while I can not get around to all the projects to meet you (because I have my work to do too, 40 hours per week plus my Presidential duties).

Local 767
15 Gervais Dr.
Suite 408
Don Mills,
Ontario
M3C 1Y8
(416) 444-1106
444-1107

I know, that you will support me and the Executive Board (plus the 95% of our Chief Steward body) in our very real fight for our job survival, a fight that with your help and support we are assured of winning and as a footnote, I might add that these same supporters of Roach are also the same people who had done their very best to get rid of him but are now costing our local (you) every dime that we have to stop these fools from bringing him back and incidentally if he ever does come back, be prepared for: (1) Dues increased to approximately \$40 per member per month and then the ultimate result: losing your job. That is what is in store for you should this person and his naive supporters ever gain power in this local.


...../2

Canadian Union of Public Employees

- 2 -

I think that you should think very seriously about what I have said to you and if you have any questions, please do not hesitate to call me at 416-444-1106.

Fraternally



Ken McGowan
President



TV

Local 767
C. U. P. E. Dr.
408
Don Mills
416) 444-1106
416) 444-1107

September 11, 1983

NOTICE TO GENERAL MEMBERSHIP, M.T.H.A.

SUBJECT: C.U.P.E. Local 767 - M.T.H.A. "DECERTIFICATION"

I am assuming that by now all of you are aware of the rumour that Don Roach, Ray Barker, John Abbott, Art Lombard, Bill Williams, Cy Simmons, Ed Morgan, Andy Pelletier are going to, or may, as of this date have already done so, apply to the Tribunal to have our Local Decertified. What I will try to do now is explain to you basically what this means and how it will affect you.

Enclosed you will find a copy of page 17 of the Crown Employees Bargaining Act which deals specifically with Termination of representation rights, you should read this article very carefully, especially those of you who signed Roache's papers to have this Decertification take place.

It is subsection (5) that will affect you the most and what it says is, that if this decertification is allowed by you to happen, your present contract will be declared null and void, in other words you will have no contract and will be left at the mercy of the Employer.

For example:

1. All benefits would be cancelled which means no dental and no OHIP payments would be made by the employer. You would have to pay everything out of your own pocket.
2. There would be no Grievance Procedures. If you think you are being wronged by management, Too Bad, you will not even be able to argue with them.
3. Your sick leave plan and credits would not exist: if you got sick and had to have time off you would not be covered and would not receive one penny for your time off.
4. You would lose the right to accumulate sick leave days and any that you have now you will lose.

For example; A Labourer making \$82.64 per day, had 100 sick leave days accumulated he will lose \$8,264.00.

A Serviceman General making \$87.60 per day and also had 100 sick leave days will lose \$8,760.00.

A Caretaker making \$85.28 per day and also had 100 sick leave days will lose \$8,528.00

GET THE PICTURE??

.../2

Canadian Union of Public Employees

- 2 -

5. Vacation Leave: you simply will lose what you have now and even if this new union could exist, it would take you years to get back what you have now.

It is the Executive Boards belief, that none of the people who have signed to have our union decertified were told all of the facts and how they can be hurt by this action and in fact were told the opposite. Roach and his puppets are using this membership to further their own gains and could care less about you and it is they who are your real enemies not myself or the Executive and the Steward body. There is a real world out there and there is also a dream world, what this letter is all about is the real world, what they are telling you is a dream world and if this decertification action comes down to a vote and you vote yes, you will soon find out the hard way who is telling you the truth, but by that time it will be too late, because all of the above that I have been telling you will happen. If you don't believe me, contact your own lawyer and see what he says. It is your future and your family's future that you are playing with and the only way you can secure your job (and only you can do it) is that should this issue ever come to a vote, you must vote NO to decertification.

While some of you may be less than happy about the way this present Administration has been running things and we admit that we are not perfect you should remember that this is not the easy 70's, but the tough 80's and we have come through these times in pretty good shape, there is nothing but unemployment, plant closings and layoffs all around us, but yet we have survived not by accident but by hard work and negotiations performed by this Executive Board and 95% of the Steward body, and I think they should be commended for what they have done for you. You would be wise to remember what line of work we are in, we do not manufacture goods or produce goods, we are in fact in a service oriented line of work of which there are thousands of unemployed people who not only could do our jobs, but would love to have them, but our greater threat would be by contractors who apply every day to management to maintain the services in our projects.

This administration has successfully defended our positions and kept our jobs from those who would give their right arm to have them, not like in the 70's when Roach was at his high of power, let management (to use just one example of many) contract out the grounds of Regent Park, that happened in the good old days, should he come back to power in the tough 80's, - need I say more?

Anyway, it appears that you will have a major decision to make and now that you have the real facts to look at, I am sure that you will make the right and positive one. Our future counts on it.

On behalf of the Executive Board and 95% of the Steward body.

Fraternally

K. McGowan

Kent McGowan

President

CUPE Canadian Union of Public Employees

Section 24 of The Crown Employees Collective Bargaining Act was

reproduced and attached to the letter of September 11.

The application for termination was filed on September 8, 1983.

The counter petition was filed on September 29, 1983.

On September 20, 1983, the applicants caused the following document to be sent to the employees in both English and Italian. The English version is reproduced below.

DON'T BELIEVE A LIE!!!!!! September 20, 1983

Finally, Ken McGowan, the illegal President of Local 767 along with the illegal state 2nd Vice President Bill Way and Murray Visconti have finally exposed themselves for what they are.

We are informed that all members of Local 767 have received a pamphlet from the so-called union Pres. Ken McGowan stating that if the decertification is allowed by you to happen certain things would happen and we quote for example:

"ALL BENEFITS WOULD BE CANCELLED WHICH MEANS NO DENTAL AND NO O.H.I.P. PAYMENTS WOULD BE MADE BY THE EMPLOYERS. YOU WOULD HAVE TO PAY EVERYTHING OUT OF YOUR OWN POCKET".

Also, the sick leave plan and credits would not exist and anyone with 100 days in their sick leave bank would lose all to the tune of approx. \$8,500 as well as loss of annual vacation entitlements! AGAIN, WE SAY DON'T BELIEVE A LIE!

Ken McGowan and supporters are saying these things would happen if you voted to decertify and get rid of these merchants of fear.

They have nothing left in their bag of 'dirty tricks' but to lie to the members. If is true, which it is not! How do they know this? They must have sat down with management and management must have told them - 'Look, if the men decertify thereby kicking you lovely people out of office in Metro, we will do all of these things'!

Well, we don't believe for one moment that any official, let alone Doug Wells the Gen. Manager of MTHA would sit down, let alone stand up with, the likes of Ken McGowan, Bill Way and/or Murray Visconti and conspire to violate or break the law!

For it is totally illegal, unfair and would be looked upon by the courts as intimidation by both Ken McGowan and management who, if this were true, were working together to frustrate, scare and intimidate, employees of Local 767 from doing what the law says they can legally do. Namely, decertify a union the employees feel and know is not doing the job it is supposed to do.

One then must ask, why would Ken McGowan, Way and Visconti say, and/or support these lies? What are they so desperate to stop the members from taking action against them

Could one of the reasons be the attached so called 'PRIVATE & CONFIDENTIAL' letter of alarm sent to Ken McGowan by the union's accountants? (READ THIS ATTACHED FINANCIAL DOCUMENT CAREFULLY).

Why must we have to give this to you? Why not the union?

On the first page #A, it states the union is technically insolvent, in other words B A N K R U P T.....BROKE to the tune of one creditor alone of \$134,000. Guess who we, you, owe that amount to? YEP - C.U.P.E. NATIONAL IN OTTAWA! How much more do we, owe?

The accountants go on to say in part quote: "This is a serious situation and we recommend that you continue to bring it to the attention of the members". Continue? NONSENSE, THE MEMBERS HAVE NEVER HEARD OF THIS BEFORE!

NOT ONLY THAT, BUT THE MEMBERS HAVE NEVER VOTED ON OR PASSED A FINANCIAL STATEMENT SINCE 1979! Is this way, among other 'serious' things, the so-called union leadership have tried to hid?

Is this why they would take the chance to try and get away with this most terrible lie that members would lose all of their medical benefits as well as sick leave credits? What a filthy rotten attempt at deception and fear!

For Ken McGowan, Bill Way, Murray Visconti and their few supporters, to even attempt to scare, frighten and intimidate grown men and their families, is an indication of how low these people would stoop!

We intend to put this "BIG LIE" where it belongs, six feet into the ground, and politically, - a union that has tried such a terrible and filthy scare tactic on their own members and the families of its members! You have just cause to feel anger towards this less than honest union leadership. As a matter of fact, Ken McGowan was the first person that we know of who publically stated local 767 should break away from CUPE NATIONAL!

Is the attached serious financial report one of the reasons he changed his mind? Just where and who has all of our money and why were we not told? Don't answer Ken, Bill and Murray - we'll find out ourselves.

ON BEHALF OF HUNDREDS OF M.T.H.A. EMPLOYEES -- Fraternally, DON ROACH, ART LOMBARD, JOHN ABBOTT, BILL WILLIAMS, ANDY PELLETIER, ED MORGAN, RAY BARKER.

The respondent union admits "that the letters of June 21, 1983 and September 11, 1983 were intended to be read by members of CUPE 767 and were factors considered by them when they signed the counter petition". The applicant "similarly admits that its letter of September 20, 1983 was delivered to approximately 200 members on or about that date".

The applicants submit (1) that this Tribunal has no jurisdiction to consider the counter petition and (2) that even if we were to consider the counter petition it does not voluntarily signify the true wishes of the employees because of the effect of the letters sent by Mr. McGowan, the president of Local 767. The respondent union submitted (1) that the Tribunal has jurisdiction to entertain the petition, (2) that the petition revoking those signatures submitted with the original application was valid and (3) that the applicant's statement of desire was invalid because of the misrepresentation of the applicants.

Since this was the first case of its kind to come before the Tribunal, both the applicant and the respondent union relied on a number of cases of a similar nature that had come before the Ontario Labour Relations Board. Cases cited to us and emanating from the Board are not controlling and are of assistance only insofar as their reasoning is persuasive. We recognize that there are similarities in the legislation; however, the Ontario Labour Relations Board has a long history with a number of concepts rooted in an earlier era of collective bargaining. This Tribunal thus has the advantage of the experience and learning of the Ontario Labour Relations Board but does not feel bound to follow its decisions if we do not consider them applicable. We are thus able to develop our own jurisprudence free of precedent and in a manner that we feel appropriate to the public sector.

At the outset, in view of our decision with respect to the counter petition, we do not propose to deal with the jurisdictional issue raised by counsel for the applicants.

What we are faced with is two rival groups who are contending for the support of the employees. There is no doubt that the employees have been subjected to a great deal of propaganda. It is always difficult to evaluate the effect of propaganda statements on employees. As ordinary citizens, they are subjected to a great deal of advertisement and propaganda emanating from many different sources. This advertisement and propaganda includes such things as commercial advertisement as well as political propaganda. One must, therefore, assume a certain degree of sophistication among the employees in being able to sift and discount propaganda, particularly propaganda emanating from rival factions. Thus, statements by one group may be cancelled by statements of the other group.

We recognize that a completely truthful environment is impossible in this kind of situation; that there will be distortions, interpretations, hyperbole, innuendo and the like and that it will be difficult to regulate the environment. It may well be that a survey or sociological study could assist in determining the impact of different kinds of persons eg. managers, supervisors, foremen, union officials, international representatives, or other employees in general, but no two situations are alike and it may be difficult to apply such studies to the variety of situations confronting Boards and Tribunals that are responsible to regulate labour relations. We hasten to add that we do not rule out attempts to introduce such studies to assist us in determining how to regulate conduct in situations such as this.

Needless to say, one or two or a few statements by different employees that they were or were not affected is often a distortion. There are some employees who are very courageous and without fear and any statements made, no matter what their source, would have little impact. Other employees are more faint-hearted and are easily persuaded or influenced. Evidence of this sort may or may not be representative of the main body of employees.

Within these constraints, labour relations tribunals have applied their experiences as best as they can. Many of the rules are conjectural, but a broad consensus has been reached in some areas. Thus, statements by members of management generally tend to have more effect than statements by employees. That is because management for the most part controls and directs the work force, whereas employees do not have the same control over the work environment. The value given to statements reflects the power of the statement's originator in the workplace. Accordingly, a statement by a manager who has the power to hire and fire, to discipline, promote, demote or transfer employees is likely to carry greater weight with the work force than a statement by a clerk, truck driver, warehouseman or tradesman.

Between these two positions is the position of a union official. Generally union officials do not have the same power as members of management, but they are not perceived as ordinary employees. They, at least, have the power to influence decisions. Employees know that union officials negotiate about different matters in the workplace and are often instrumental in affecting changes. They consult with management about layoffs, transfers and promotions, and grievances. They negotiate the terms and conditions of collective agreements, call strikes, decide when to go to arbitration, and make recommendations to the members. They often

attend union schools and become knowledgeable about labour legislation such as unemployment insurance and workmen's compensation statutes, and are often very knowledgeable and skillful in interpreting the collective agreement for and on behalf of the employees. Thus, union officials are viewed both as sources of knowledge and also as persons who are able to influence events in the workplace. Accordingly, statements made by union officials, while they do not have the same weight as those made by members of management are generally measured against a higher standard than statements made by ordinary employees.

In addition to the persons who make or utter the statements, we must be concerned with the kinds of statements made. Labour Relations Boards and Tribunals cannot exact a "truth in advertising" standard. We are dealing with statements in the workplace made by persons who may be unsophisticated and who may interpret documents, statutes, and collective agreements with a layman's understanding, rather than a lawyer's training, and thus we must refrain from establishing standards of purity. Nonetheless, we must be concerned with conduct that threatens both physical violence and economic harm or reprisals to such a degree that we are unable to conclude that the voluntary wishes of the employees have been expressed.

The workplace is not an environment that parallels the ordinary environment. A vote in the workplace is not like casting a ballot in a general election. While the result of a general election, federal, provincial or municipal, has a serious and major effect on citizens, the results are often not viewed as direct or as influential as a representation vote in the workplace. Employees are closely, directly, and materially affected by a vote for or against a union and the dynamics of the workplace are such that the result of a representation vote could have a direct and immediate

impact on employees. Thus, threats of physical violence or economic reprisals must be carefully scrutinized when it comes to assessing conduct in workplace votes.

If this application were to succeed, the Tribunal under section 24 of the **Act** is required to declare that CUPE 767 no longer represents the employees in the bargaining unit. Also any collective agreement in operation that binds the employer, the union and the employees, ceases to operate. The employees are, in law, left to bargain individually with the employer and collective bargaining ceases until such time as the employees may choose, by a majority vote, another bargaining agent.

That does not mean that all the benefits and advantages of a collective agreement will automatically or necessarily be withdrawn from the employees. The employer may choose to keep the benefits and advantages in effect. However, the loss of representation and the cessation of operation of the collective agreement means that the benefits and advantages that once existed in the collective agreement may be made the subject of negotiation between the employer and the individual employees.

Also, collective bargaining and a new collective agreement will not be automatically restored. In order for there to be collective bargaining after a successful termination application, another union must gain representation rights and negotiate a new collective agreement. To do that, this other union must apply for representation rights and comply with all the procedures of **The Crown Employees Collective Bargaining Act** including the obtaining of more than fifty per cent of the ballots cast in a representation vote. Thus, some time period may elapse before collective bargaining is restored and there is no guarantee that it will, in fact, be restored. Often more than one union will attempt to organize employees who have been left unorganized but who desire representation.

With all these considerations in mind, we turn now to a brief background of the dispute between the parties and the documents that the rival groups have issued. The incumbent Local, Union 767, of the Canadian Union of Public Employees, is, of course, one of the main protagonists. Its president is Ken McGowan, and he is assisted in this dispute by some, but not all, of the local's union officials.

The rival group is spearheaded by Don Roach, a former president and business manager of Local Union 767. Mr. Roach has had a dispute with the incumbent union, the facts or merits of which are not of concern here, and has formed his own union in which he is president and business manager. He is supported by some officials of CUPE Local 767. His intent is to bring about the termination of the bargaining rights held by CUPE Local 767 and then to solicit membership among the employees in the bargaining unit for the purpose of having his union displace CUPE Local 767. To this end he has solicited employees in the bargaining unit for this application as the first step in his attempt to gain representation rights for his own union.

The documents issued by the respondent union on June 21, 1983, and September 11, 1983, must be read in the context of the dispute between the rival groups. The letters by Mr. McGowan, written by him on union stationery and signed by him as president, have an official appearance. In the letter of June 21, 1983, there is a statement to the effect that if Roach does come back the members will have their dues increased "and the ultimate result: losing your job. That is what is in store for you should this person and his naive supporters ever gain power in this local." We view the suggestion to employees that they might lose their jobs as being extremely serious. There is almost no threat that is more serious to an employee than the threat of losing his or her job and when that suggestion is made by a

responsible union official it must be given great weight in assessing whether subsequent documents signed by the employees are voluntary.

It is true that the statement is tempered somewhat by the suggestion that the loss of jobs will result if Roach and his supporters gain power in this local. By that we take the letter to mean CUPE Local 767 and since this application is to terminate CUPE Local 767's bargaining rights it may well be that, in this context, the employees need not have any concern for their jobs.

Nonetheless, it is our view that there is at least a lingering impact of the statement, to the effect, that if Roach gains power the employees will lose their jobs. This Tribunal might have considered discounting the statement, and its lingering effects, in the context of this case, if it had not been for the letter of September 11, 1983 in which a series of very serious economic reprisals are listed if the termination application is unsuccessful. These statements are worth repeating. They are as follows:

"For example:

1. All benefits would be cancelled which means no dental and no OHIP payments would be made by the employer. You would have to pay everything out of your own pocket.
2. There would be no Grievance Procedures. If you think you are being wronged by management, Too Bad, you will not even be able to argue with them.
3. Your sick leave plan and credits would not exist: if you got sick and had to have time off you would not be covered and would not receive one penny for your time off.
4. You would lose the right to accumulate sick leave days and any that you have now you will lose.

For example; A Labourer making \$82.64 per day, had 100 sick leave days accumulated he will lose \$8, 264.00.

A Serviceman General making \$87.60 per day and also had 100 sick leave days will lose \$8, 760.00.

A Caretaker making \$85.28 per day and also had 100 sick leave days will lose \$8,528.00.

GET THE PICTURE??"

These threats of potential economic harm are extremely serious. In argument, the respondent union had admitted that the letter might be better written. For example the union suggested that it would have an easier case if the wording had been "all benefits might be cancelled..." rather than "all benefits would be cancelled." We agree that the letter might have been better worded. Nonetheless we have the letter as is, and we must determine as best we can the extent of the impact on the employees. The suggestions made are even more serious when coupled with the earlier suggestion that the employees might lose their jobs. In short, we have a suggestion by a union president that if employees decide to follow Roach and his group that they will lose their jobs and lose their benefits.

These suggestions reach deep into the employees' economic pockets. Those threats, if made by a member of management, would surely eliminate from consideration a petition signed by a group of employees on a certification application. It is our view that when threats or suggestions of this nature are made by a responsible union official, who is perceived by employees as knowledgeable, that they have such a serious impact that we must conclude that a document signed by employees following the issuance of these documents does not reflect their voluntary wishes and accordingly we are not prepared to give the counter petition any weight.

Further, the suggestion made to the employees that they consult their own lawyers does not obviate the effect of the language and suggestions contained in the letter. Bearing in mind the nature of the bargaining unit, we do not think it realistic to expect that the employees would bear the expense of their own lawyers or seek legal advice once they had been informed by their union leadership as to the consequences of their

action. Accordingly, the suggestions made, to get legal advice, in our view, do not cancel the union's suggestions of economic harm that might befall the employees.

The next matter for consideration is the voluntariness of the signatures filed with the application for termination. As we have indicated, Mr. Roach and his immediate supporters are waiting in the wings with their own union hoping to attempt to represent the employees with that union. Mr. Roach was the president and business manager of CUPE Local 767, and he holds the same position with the new union. Mr. Roach admitted in his testimony that he would receive a salary of \$40,000.00 per year from the new union. Of course, that salary is subject to Mr. Roach's being able to gain recognition of his union under the **Act** and to enlist the support of the employees in this bargaining unit as well as other groups so that his union becomes a viable dues collecting entity. Thus, while Mr. Roach has no official status or no current influence over management in the treatment of the employees in the bargaining unit, his status is that of a union official and statements made by him and his immediate supporters as well as documents issued by him must be scrutinized in that context.

The union alleges that there has been misrepresentation, in that, employees were not told that there could be a time gap between any termination and future representation, when the employer would not be bound by the collective agreement and where employees might also lose their benefits. It is also argued that Mr. Roach did not take the proper legal avenue to displace the union, that his union does not have sufficient membership to represent the employees and that Mr. Roach has an ulterior motive in bringing this application i.e. a salary of \$40,000.00 per year which will be, in effect, paid by the employees through dues to his new union.

While we recognize that there may have been omissions in what Mr. Roach has told the employees, it is our view that in the circumstances of this case, the employees, by bringing an application, are primarily interested in the representation by CUPE, Local 767. There is an ongoing battle between the incumbent union and the Roach group. The matter of a new union is not an issue in this case; it is merely speculative. While it is desirable that employees be made aware of all the relevant facts and legal issues, there are some limits. Our concern is whether the employees were improperly influenced to sign the documents in support of the application. Based on all the facts and given the ongoing battle between the groups, while it might have been better to ensure that the employees were made aware of all the consequences of this application, we are not prepared to say that the signatures in support of the application are not voluntary. The document of September 20, 1983, is merely a counter to the union's letters and in the circumstances does not derogate from the voluntary nature of the statements of desire filed by the applicants.

Further, the consequence of this application is to order a vote. The application by itself does not result in automatic termination, and since more than fifty percent of the employees in the bargaining unit have voluntarily signified in writing at the terminal date fixed for this application, that they no longer wish to be represented by the respondent union, a representation vote shall be conducted to determine whether or not the employees desire that the right of the respondent union to bargain on their behalf be terminated.

The matter is referred to the Registrar.

DATED at Toronto, Ontario, this 23rd day of January, 1984.

"O. B. Shime"

O. B. Shime, Q.C. for the Tribunal

ONTARIO PUBLIC SERVICE LABOUR RELATIONS TRIBUNAL

T/14/83

Between: Bill Williams, Arthur Lombard, Ed Morgan,
Andy Pelletier and John Abbott

Applicants

- and -

Ontario Housing Corporation Employees Union
Local 767, C.U.P.E.

Respondent

Before: O. B. Shime, Q.C., Chairman
C. Jecchinis and J. H. McGivney, Q.C., Tribunal Members

Appearances at the Hearing:

For the Applicants: R. Lambert, Counsel and others

For the Respondent
Union: B. B. Fisher, Counsel and others

For Ontario Housing
Corporation: A. P. Tarasuk, Counsel and others

Date of Hearings: September 12, 1984
September 13, 1984
March 20, 1985
March 21, 1985

In this matter a number of employees had applied for a declaration that the respondent union no longer represent the employees in the bargaining unit. In an earlier decision the Tribunal ordered a representation vote to determine whether or not the employees desire that the right of the employee organization to bargain on their behalf be terminated.


On the taking of the representation vote less than 50 per cent of the ballots cast were in opposition to the employee organization. The applicants then made certain allegations concerning the vote.

Having regard to the evidence and the argument and in the particular circumstances of this case the Tribunal determined that there was no impropriety by the respondent union, or by the employer per se, prior to or during the taking of the vote.

The only allegations of concern were with respect to a Mr. Paul Witzell, a supervisor. However after considering the evidence in support of the allegations and assuming, but without finally deciding that the allegations are supported by the evidence, it is our view, that in context and given the history of this matter, the intense rivalry between the employee factions, and the geographical nature of the employer's operations that the wishes of the employees and the vote would not have been affected.

The application is dismissed.


DATED at Toronto, Ontario, this 29th day of April, 1985.

A handwritten signature in dark ink, appearing to be 'O.B. Shime', written in a cursive style.

O.B. Shime, Q.C., Chairman

A handwritten signature in dark ink, appearing to be 'C. Jecchinis', written in a cursive style.

C. Jecchinis, Member

A handwritten signature in dark ink, appearing to be 'J. H. McGivney', written in a cursive style.

J. H. McGivney, Q.C., Member



ONTARIO PUBLIC SERVICE

**LABOUR
RELATIONS
TRIBUNAL**

180 DUNDAS STREET WEST, TORONTO, ONTARIO, M5G 1Z8 - SUITE 2100

TELEPHONE: 416/598-0688

T17/83

BETWEEN: ONTARIO PUBLIC SERVICE EMPLOYEES UNION
Applicant

- And -

THE CROWN IN RIGHT OF ONTARIO
(Ministry of Health)
and its agents, George Kytayko,
George Rose, John P. Zarudny Respondent

BEFORE: O. B. Shime, Q. C., Chairman and
E. C. Witthames, Member
J. H. McGivney, Q. C., Member

APPEARANCES AT THE HEARING: L. Rothstein, Counsel and others,
for the Union
D.W. Brown, Q.C., Counsel and others
for the Employer

DATE OF HEARING: February 17, 1984
March 6, 1984
April 17 & 18, 1984

This is a complaint pursuant to Section 37 of The Crown Employees Collective Bargaining Act (CECBA) alleging that the respondent Ministry of Health, through the actions of the remaining respondents, Mr. G. Kytayko, Mr. G. Rose and Mr. J. Zarudny, has threatened, intimidated or coerced Ms. Pearl Ene and Ms. Jennifer Thomas because of a belief that they were about to participate in a proceeding under the Act or might testify in a proceeding under the Act.

The background facts leading to the complaint are as follows. In December of 1982 a Ms. Lena Daley, who was a probationary employee with the Ministry of Health, was released from her employment. Ms. Daley grieved and her grievance was eventually scheduled to be heard by the Grievance Settlement Board in April of 1983. The hearing was adjourned and ultimately it was rescheduled and hearings commenced on October 5, 1983. These hearings continued in the Fall and concluded on Tuesday February 14, 1984.

On September 30, 1983, just prior to the commencement of the arbitration Ms. Ene and Ms. Thomas were told to attend at the personnel office by Mrs. J. Rodriques, manager of word processing. At that office they were questioned by Mr. J. Zarudny, a solicitor with the Ministry of the Attorney General who at the time was acting for the Ministry of Health in the Daley arbitration. Suffice it to say, at this time, that Ms. Ene and Ms. Thomas refused to co-operate with Mr. Zarudny.

On Tuesday October 4, 1983 Ms. Ene and Ms. Thomas met with Mr. Rose, director of operations and Mr. Kytayko who told them that they had to co-operate with Mr. Zarudny.

That afternoon both Ms. Ene and Ms. Thomas were subpoenaed to be witnesses at the Daley arbitration. After receiving the subpoenas they again met with Mr. Zarudny and responded to his questions.

This complaint essentially concerns the discussions between the respondents and Ms. Ene and Ms. Thomas which occurred on these two separate days.

Pearl Ene testified that although she was aware the arbitration was proceeding she was not involved with the proceedings. On or about September 12, 1983 Ms. Ene and Ms. Thomas went to a meeting with Mr. Rose concerning other matters in the word processing department. During the meeting the subject of the Daley firing arose and Ms. Ene and Ms. Thomas stated that Ms. Daley was unfairly fired. According to Ms. Ene, Mr. Rose stated that "if we (Ms. Ene and Ms. Thomas) felt so strongly we should go as witnesses for Lena Daley". Mr. Rose also mentioned that the case was to be heard in October.

Approximately one week before the hearing Ms. Ene was called by Ms. Daley to be a witness and agreed; this was the first indication to Ms. Ene that she might be a witness.

On September 30, 1983 at about 4:00 p.m. Ms. Ene was asked by Mrs. Rodrigues to come to the personnel office where she met Mr. Zarudny. Mr. Zarudny advised her that he was representing the employer in the Daley arbitration. According to Ms. Ene, Mr. Zarudny asked her if she knew there was to be an arbitration hearing and she responded affirmatively.

Mr. Zarudny then began to ask questions about Ms. Daley's work performance and Ms. Ene replied that she didn't want to get involved in what was happening. She refused to answer his questions. Ms. Ene stated that "by the tone of his voice Mr. Zarudny kept getting angrier and angrier. The volume of his voice was raised." Mr. Zarudny then told her, it was the first time he had come across a situation where an employee was refusing to co-operate in assisting the employer, and then he stated that she "could be penalized for not co-operating." Although Mr. Zarudny did not indicate how she could be penalized, Ms. Ene understood that she could be fired.

She further testified that Mr. Zarudny became angrier and told her he could subpoena her to sit through the proceedings, but she still refused to answer and asked to end the meeting. She got up to leave and on the way out Mr. Zarudny asked her "if she was to be subpoenaed by the union would she talk to him." Ms. Ene said "no—it would depend on what the union had to say."

According to her Mr. Zarudny retorted "Do you always do what the union says?" Ms. Ene said "yes".

On Tuesday October 4, 1983 Mrs. Rodrigues asked Ms. Ene and Ms. Thomas to see Mr. Rose. Both Ms. Ene and Ms. Thomas saw Mr. Rose at about 10:00 a.m. Ms. Ene testified Mr. Rose informed the two employees that he had a cold and then stated "Girls, girls, why are you giving me so much trouble?" Ms. Thomas replied, "what trouble?", and Mr. Rose responded that he had heard that the two employees "had refused to co-operate with the guy who was in on Friday."

Ms. Ene said that she didn't think that she had to answer and Mr. Rose replied that they had to co-operate with their employer and they had no choice in the matter.

At that point Mr. Kytayko joined the meeting and explained that the employees had to co-operate and if they refused they could face disciplinary action. Ms. Ene answered that if she had known what was expected of her she would have co-operated. She explained that to mean that she would co-operate rather than face discipline. In any event Ms. Ene told Mr. Kytayko and Mr. Rose that she would see Mr. Zarudny when he returned that afternoon.

Prior to lunch Ms. Ene received a subpoena to the arbitration proceedings. She had been informed earlier that day by Ms. Daley that she was going to be subpoenaed. However Ms. Ene was not asked whether she was going to be a witness for Ms. Daley.

The subpoenas were received at the office by Mrs. Rodrigues and there was some discussion between Mrs. Rodrigues and Ms. Ene regarding the conduct money.

At about 2:00 p.m. Ms. Ene was told by Mrs. Rodrigues to report to the personnel office. She was met by Mr. Kytayko who asked her to wait in the reception area. Approximately five or ten minutes later Mr. Kytayko ushered

her into the office where she met Mr. Zarudny who again told her that if she refused to co-operate that she would face disciplinary action. At that point Mr. Zarudny proceeded to question Ms. Ene and she responded to his questions.

During the questioning Mr. Zarudny took notes and at the end of the meeting after reviewing the notes, Ms. Ene signed them.

Ms. Jennifer Thomas, an employee in the processing department at the Queen St. Mental Health Centre testified to the same effect as Ms. Ene. She had earlier advised Ms. Daley that she would be a witness if subpoenaed; however, she did not tell Mr. Rose that she would be a witness.

On Friday September 30 she was called to a meeting with Mr. Zarudny where she was asked questions about Ms. Daley's work performance. Ms. Thomas responded to some of the questions and then decided that she did not want to answer any more questions. Mr. Zarudny asked Ms. Thomas if she was deliberately refusing to co-operate with her employer. She replied that she wanted to speak to her union. According to Ms. Thomas, Mr. Zarudny asked her why she had to speak to the union. She again stated that she didn't want to answer any more questions and left.

On Tuesday October 4, Ms. Thomas was at the meeting at Mr. Rose's office with Ms. Ene. She corroborated Ms. Ene's evidence in all material respects. More particularly she testified that Mr. Kytayko told her and Ms. Ene that they had to answer questions or they would be disciplined.

Ms. Thomas received her subpoena after lunch and then went to meet Mr. Zarudny. Her evidence differs from Ms. Ene's in that she testified that she told Mr. Zarudny that she had received a subpoena. Mr. Zarudny continued to question her after being so advised. He took notes and later Ms. Thomas signed the notes.

Ms. Thomas also testified that at the meeting of September 30 with Mr. Zarudny no threats were made when she advised him that she didn't want to answer any questions.

Mr. John Zarudny, a lawyer with the Ministry of the Attorney General testified that he was responsible for presenting the employer's case in the Daley arbitration and to that end arranged to interview witnesses on September 30, 1983. He interviewed some of the management personnel and then arranged to see Ms. Ene and Ms. Thomas.

Mr. Zarudny testified that when he interviewed Ms. Ene, that Mrs. Rodrigues was in the room but said nothing. He explained his role and question and according to him Ms. Ene boldly stated that she had no intention of co-operating with the employer by discussing Ms. Daley's work performance. Mr. Zarudny claimed that he was surprised by Ms. Ene's response and advised her that he was surprised by her attitude and could not recall another employee having that attitude or taking that position and he would take it under advisement. He testified, contrary to Ms. Ene, that he did not speak in an angry voice and that Ms. Ene simply got up and left. Mr. Zarudny thanked her and said good night. He categorically denied that he told her what would happen if she refused to answer as he had not formed an opinion whether he could require her to provide the information.

Mr. Zarudny recounted a similar experience with Ms. Thomas. He stated that she responded to some questions, then abruptly indicated that she wouldn't co-operate further. According to Mr. Zarudny he told her that he expected her to tell the truth, that he wasn't asking for anything other than the truth and that he didn't know if he could require her to provide him with information. Ms. Thomas then indicated she wanted to leave and Mr. Zarudny thanked her for attending.

On October 3, 1983 Mr. Zarudny discussed the matter with Mr. Kytayko who said that he intended to meet with the two employees to obtain an explanation why they wouldn't co-operate. Mr. Kytayko felt that the employees may not have answered because of Mrs. Rodrigues' presence and Mr. Zarudny agreed to return to interview the employees. He returned on October 4, 1983 and testified that the interview proceeded smoothly.

Under cross examination Mr. Zarudny denied telling the employees they could be penalized. Later under cross examination when the question of a penalty came up Mr. Zarudny stated "I can't recall indicating they could be penalized in those kind of terms. I didn't say they could or would be penalized."

With respect to his conversations with Mr. Kytayko, Mr. Zarudny could not recall whether he said the employees would face discipline.

Mr. George Rose, the regional personnel administrator, testified that he spoke to Ms. Ene and Ms. Thomas in September 1983 and that among other things Ms. Daley's termination was discussed. He stated that he told them that if they felt strongly about Ms. Daley they should contact their union.

On October 4 Mr. Rose was contacted by Mr. Kytayko and advised that Mr. Zarudny was having trouble with Ms. Ene and Ms. Thomas and that they had refused to co-operate. Mr. Kytayko advised Mr. Rose that "it was being looked into whether the employees could be disciplined in this regard." Mr. Rose became angry and said that these employees had always cooperated and should not be disciplined.

He asked to see the two employees and when they arrived in his office he said "I hear we have a problem". He told them that he had been informed that they refused to co-operate. According to Mr. Rose, Ms. Thomas felt threatened by Mrs. Rodrigues' presence. Mr. Rose agreed with her position.

Then Mr. Rose explained to Ms. Ene and Ms. Thomas that they should co-operate, that the employer only expected the truth and would they meet with Mr. Zarudny and co-operate. The employees replied that they would.

Mr. Kytayko came in at that point and he again reviewed the situation with the employees and explained that the solicitor only wanted the facts. Mr. Rose told him that the employees felt threatened by Mrs. Rodrigues' presence and Mr. Kytayko agreed to exclude Mrs. Rodrigues from further meetings. He also indicated that he would be present and the employees agreed to that. Mr. Rose testified that no mention was made of possible discipline.

Mr. Rose testified that in his mind he felt both employees would be witnesses. He was also aware through his conversation with Mr. Kytayko that Mr. Zarudny was looking at the possibility of discipline. He also stated that he told Ms. Ene and Ms. Thomas that they should co-operate but did not say that they had to co-operate. However, later in his evidence Mr. Rose stated that he felt it was the employees' obligation to co-operate.

Mr. George Kytayko, the personnel administrator at the Queen Street Mental Health unit testified that he received a call from Mrs. Rodrigues who informed him that Ms. Ene and Ms. Thomas had refused to co-operate. This was confirmed by an early call from Mr. Zarudny on the morning of October 4, 1983. Mr. Zarudny indicated that he was surprised by the situation but that he was looking into the matter and felt it was possible to discipline the employees. Mr. Zarudny also informed him that he had a right to interview any employee who had information concerning a grievance.

Mr. Kytayko told Mr. Zarudny that he would meet with Mr. Rose and possibly the employees to find out why they refused to co-operate. Mr. Kytayko also felt that he might advise them that Mr. Zarudny had indicated that it was a possibility the employees could be disciplined if they weren't prepared to co-operate.

When the matter was discussed with Mr. Rose, he expressed his concern about disciplining the employees and suggested that there might have been a reason for their refusal to co-operate. As a result of these conversations Mr. Kytayko joined the meeting between the employees and Mr. Rose. He testified that the employees were uncomfortable with Mrs. Rodrigues in the room and concluded that was the reason for their lack of cooperation.

Mr. Kytayko also explained that the employees had an obligation and responsibility to co-operate with the lawyer for the employer and asked if the employees were prepared to meet with Mr. Zarudny as long as Mrs. Rodrigues was not present. He testified that there was no mention of discipline at the meeting.

Following the meeting Mr. Kytayko discussed the situation with Mr. Zarudny and advised him that Ms. Ene and Ms. Thomas were prepared to meet with him. Mr. Kytayko also admitted that he was advised by Mrs. Rodrigues at about 1:00 p.m. that day that Ms. Ene and Ms. Thomas had been subpoenaed and he in turn informed Mr. Zarudny of that fact at about 2:00 p.m. prior to his meeting with the two employees. Mr. Kytayko also denied that there was any mention of discipline when he met with the employees.

It is apparent that there is a conflict in the evidence concerning the alleged threats of a penalty or discipline and the first task of this Tribunal is to assess the evidence of the various witnesses who testified about that issue.

First, the evidence of Ms. Ene and Ms. Thomas was quite independent. They had no personal stake in the Daley proceedings—they were strangers to the Daley situation. While they no doubt held personal views about the justification of the Daley termination they were not affected by the outcome; moreover they did not know Mr. Zarudny and do not appear to be improperly motivated against him, nor is there anything in their evidence to suggest that they held any animosity or were improperly motivated against Mr. Rose or Mr. Kytayko. Indeed Mr. Rose's testimony and particularly his evidence which suggests that he did not want to discipline the employees suggests that he respected Ms. Ene and Ms. Thomas and felt that they were co-operative. The inference from that testimony is that at least Mr. Rose enjoyed a personable relationship with Ms. Thomas and Ms. Ene unmarked by any personal animosity.

While the evidence of Ms. Ene and Ms. Thomas is independent and does not appear to be improperly motivated the evidence of the respondents Kytayko, Rose and Zarudny is not independent. They clearly have a stake in the outcome of these proceedings. But that factor alone need not decide the issue in these proceedings because there are other elements in the testimony that point to a decision.

Apart from the independence and lack of improper motivation in the testimony of Ms. Ene and Ms. Thomas this Tribunal was impressed with the way

both Ms. Ene and Ms. Thomas gave their evidence. Ms. Ene, particularly, gave her evidence in a straightforward and unhesitating manner. She made notes of what occurred and in general we found her testimony to be highly credible.

She did not know Mr. Zarudny before these events occurred and there was no reason for her to fabricate her testimony about her conversation with him. By comparison to her evidence which was straightforward and direct we found Mr. Zarudny's evidence to be tentative, at times forgetful and generally not as straightforward as that of Ms. Ene. At different times Mr. Zarudny was hesitant or he failed to recollect portions of the meeting with Ms. Ene and at other times he equivocated in explaining.

Also Mrs. Rodrigues who was a member of management and was present at the interview with Mr. Zarudny and Ms. Ene was not called as a witness. No explanation was given as to why she did not testify and in our view an inference must be drawn that her evidence would not have assisted the employer's position. Murray v City of Saskatoon, 1952, 2 D.L.R. 499, 505-06, 4 W.W.R. (N.S.) 234, 239-40, (Sask Ct of App); Wigmore on Evidence; 3rd ed., vol. II pp. 162 et seq.

And finally it is admitted by the respondents that the question of discipline was discussed and considered. It simply strains our credulity that while the matter was being discussed by the employer's representatives that the two employees who were totally inexperienced in matters of this sort just happened upon the notion that they might be disciplined. We simply find it incredible to accept that the two employees coincidentally conjured up a story that they might be disciplined while the employer's representatives were discussing discipline.

We also find that the possibility of discipline was presented to Ms. Ene and Ms. Thomas in their conversations with either Mr. Rose and Mr. Kytayko who had discussed the idea and that as a result of the suggestion of discipline made to them the two employees co-operated with Mr. Zarudny.

We now turn to the legal aspects of this case. The complaint alleges a violation of Sections 37(1)(b) and (d) of the Act. That section provides as follows:

37.—(1) The employer or any person acting on behalf of the employer shall not,

(b) threaten dismissal or otherwise threaten a person;

(d) intimidate or coerce or impose a pecuniary or other penalty on a person,

because of a belief that he may testify in a proceeding under this Act or because he has made or is about to make a disclosure that may be required of him in a proceeding under this Act or because he has made an application or filed a complaint under this Act or because he has participated or is about to participate in a proceeding under this Act.

Section 37 of the Act is important because it protects employees from improper conduct by both the employer and the trade union (section 37(2)). Witnesses in proceedings under this Act are in a different position from persons who may testify in other proceedings in the courts. Thus, for example, a person who witnesses an automobile accident may have no relationship to the competing litigants. He or she stands as a stranger to the plaintiff and defendant in a civil proceeding. Under this Act the witness is usually an employee who is not usually a stranger to either the employer or the union. The witnesses are almost always employees and as such are vulnerable to the power of the employer; also many of the employees are union members and also vulnerable to the power of the union. Because the witnesses are subject to the power relationships that exist in the workplace the Act seeks to ensure that they are protected if they are witnesses. Their subordinate role to the dominance of the employer and the union in the workplace requires the protective measures which section 37 provides.

Moreover the processes under the Act are protected by ensuring that those who are witnesses are free from extraneous pressures when they testify or complain or do one of those things that are enumerated under section 37.

It is important to note that the acts complained about in section 37(1)(a)(b)(c) and (d) must arise "because" of a belief that a person may testify or

"because" that person has made or is about to make a disclosure or "because" the person has made an application or filed a complaint or "because" the person has participated or is about to participate in a proceeding. Thus the reasons for the enumerated acts in sections 37(a)(b)(c) and (d) must be motivated "because" of one of the considerations outlined in the balance of the subsection.

We pause to note that section 37(2) dealing with the acts of a trade union is more limited in scope presumably because the trade union is more limited than the employer in the potential harm or difficulties that it may visit on the employees.

The difficulty in this case is whether the threats or other acts complained about under sections 37(1)(b) and (d) were improperly motivated. Thus were threats of discipline which could be construed as a violation of section 37(1)(b) and (d) made because of a belief that Ms. Ene and Ms. Thomas might testify at the arbitration or because they might make a disclosure in the arbitration proceeding or because they were about to participate in the arbitration proceeding?

The applicant states that the Ministry coerced Ms. Ene and Ms. Thomas because of a belief that they would participate in proceedings under the Act. The respondents deny that such coercion occurred and alternatively claim that the motivation proscribed by section 37 of the Act was not present.

In our view it is proper to draw inferences from conduct as to the propriety or impropriety of certain conduct. However in this case there were positive expressions of intent. The threats of discipline were made in the context of trying to gain co-operation from employees in relating certain factual information surrounding the termination of Ms. Daley. There was not an overt attempt to threaten employees because they might testify or because they were about to participate in a proceeding. We are prepared to assume for the purposes of this case that the respondents knew that Ms. Ene and Ms. Thomas were going to be called as witnesses. However threats or references to discipline were not because of the reasons protected by the Act. Discipline was

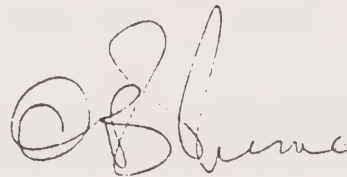
contemplated because Ms. Ene and Ms. Thomas refused to co-operate in being interviewed about Ms. Daley's work performance and her subsequent termination. It was their refusal to convey information about these circumstances that brought about the references to discipline. It was not because they were going to be witnesses or were about to participate in proceedings as contemplated by section 37. Indeed the whole tenor of Ms. Ene's and Ms. Thomas' evidence concerning their meetings suggests that the threats of discipline or penalty resulted from their refusal to co-operate in providing information and not because they were going to be witnesses or participants in the proceedings. Thus for example Ms. Ene's notes of the conversation reveal the following:

"Mr. Zarudny then started to become very angry, stating that it was the first time he had ever encountered anything like this before where an employee was refusing to co-operate in assisting Management and that I could be penalized."

There is no suggestion whatsoever that there was an attempt by threats or penalty or otherwise to deter the employees from testifying or participating in any way in the arbitration proceedings.

Nor is this a proper case for drawing inferences as to the employer's conduct in view of the clear expressions of intent which may have lacked in discretion, but did not lack in candour. In short the motivation required to find a violation of the Act is not present and the application is accordingly dismissed.

DATED at the City of Toronto this tenth day of September, 1985.

A handwritten signature in cursive script, appearing to read 'O B Shime', written in dark ink.

Owen B. Shime, Q.C.
For the Majority

DISSENT

The majority decision in this case fails to put Section 37 of The Crown Employees Collective Bargaining Act into a meaningful perspective or to give full effect to its intended protection of witnesses' rights.

The issue becomes: Can an employer compel an employee under a threat of discipline to answer questions regarding the facts and circumstances surrounding an impending arbitration hearing?

Section 37 of the Act reads:

- (1) The employer or any person acting on behalf of the employer shall not,
 - (a) refuse to employ or continue to employ a person;
 - (b) threaten dismissal or otherwise threaten a person;
 - (c) discriminate against a person in regard to employment or a term or condition of employment; or
 - (d) intimidate or coerce or impose a pecuniary or other penalty on a person,

because of a belief that he may testify in a proceeding under this Act or because he has made or is about to make a disclosure that may be required of him in a proceeding under this Act or because he has made an application or filed a complaint under this Act or because he has participated or is about to participate in a proceeding under this Act.

- (2) No employee organization or person acting on behalf of an employee or organization shall,
 - (a) discriminate against a person in regard to employment or a term or condition of employment; or
 - (b) intimidate or coerce or impose a pecuniary or other penalty on a person,

because of a belief that he may testify in a proceeding under this Act or because he has made or is about to make a disclosure that may be required of him in a proceeding under this Act or because he has made an application or filed a complaint under this Act or because he has participated or is about to participate in a proceeding under this Act. 1972, c. 67, s. 35.

On September 30, 1983, two employees of the respondent, namely Ms. Pearl Ene and Ms. Jennifer Thomas were interrogated by legal counsel for the respondent, Mr. John Zarudny, and during the course of that interrogation Mr. John Zarudny, when faced with a refusal on the part of Ene and Thomas to co-operate (as he put it), complained that this was the first time he had experienced this type of a situation and stated they - - - "could be penalized for not co-operating". In fact, Ene gave evidence that she understood Mr. Zarudny to indicate that she could be fired.

On October 4, 1983, Ms. Ene and Ms. Thomas were called to a meeting with Mr. Rose, Director of Operations and Mr. Kytako, Personnel Administrator, who told them to co-operate with Zarudny or face discipline. In effect, they were being asked under a threat of discipline to answer questions surrounding a matter of arbitration. That same day, both Ene and Thomas were subpoenaed by the Union to be witnesses at Mr. Daley's Arbitration hearing.

On October 4, 1983, Ms. Ene was called to a second meeting with Mr. Zarudny. Ms. Ene's evidence is that she took the subpoena she had just received with her. Again she was told that she must co-operate and if she refused she would face disciplinary actions.

Questions were asked at this second meeting regarding one L. Daley who was the subject of a pending arbitration hearing. At the termination of the meeting, Ms. Ene was asked to read notes taken by Mr. Zarudny and to sign them, which she did.

Mr. Zarudny had a similar encounter with Ms. Thomas that apparently came to an abrupt end when Ms. Thomas stated she wouldn't co-operate further unless she could speak to someone from the Union. Mr. Zarudny, as he did numerous times while giving evidence, "couldn't recall" the request of Ms. Thomas to see someone from the Union.

The evidence in this case is clear. The respondent (the employer) did threaten to discipline Ene and Thomas unless they co-operated. It was common knowledge that Ene and Thomas were Union witnesses. They were the victims of an interrogation camouflaged as an interview by Counsel for the employer because they

were about to participate in a matter of arbitration, a proceeding under The Crown Employees Collective Bargaining Act.

With the greatest of respect for the learned gentlemen of law forming the majority, they have turned their attention to only, in their words, "an overt attempt to threaten employees because they might testify or because they were about to participate in a proceeding". In other words, the Act, in the majority's view, applies only if an employee is threatened because he/she is going to be witness; i.e. Don't be a witness or else!

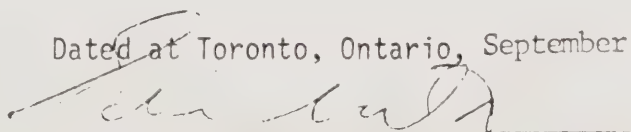
Section 37 (1) protects witnesses from any threat by an employer while they are, as the section states, "about to participate in a proceeding under this Act" and not just threats directed at them should they act as witnesses.

In this case, Ene and Thomas were threatened with discipline if they didn't co-operate with Mr. Zarudny. Both fall under Section 37 as 'participants' as they were both involved (as witnesses) in a hearing under the Act. If they had not been union witnesses in the upcoming Daley arbitration, it is unlikely that the employer would have tried to question them. The employer made no attempt to question other employees. Ene and Thomas, 'participants' under Section 37, were threatened with discipline, not for being witnesses but because they refused to respond to their employer's pre-hearing interrogation. In either case, the protection of Section 37 should apply.

Hughes, J. in R. V. Burnell Communication et al (1973), 45 D.L.R. (3d) 218, indicates that in a section of the Canada Labour Code similar to Section 37, the use of the word 'because' enabled the Board to "legimately take an expanded view of its application" if they were satisfied by the evidence that the fact that the penalized person (or persons) filed a complaint under the Act, or participated in or was about to participate in a proceeding under the Act, was present in the mind of the threatening party.

Based on the evidence which is well and clearly documented in the Majority award, there was a threat of the type that the legislators envisioned when they gave the broad latitude to Section 37 providing a protection for witnesses and their rights. I would issue a cease and desist order against the respondents.

Dated at Toronto, Ontario, September 10, 1985.



E. C. WITTHAMES, MEMBER

Between: Canadian Union of Public Employees
Local 1750

Applicant

- and -

Workers' Compensation Board

Respondent

Before: O. B. Shime, Q.C., Chairman
E. C. Witthames & J.H. McGivney, Q.C., Tribunal Members

Appearances
at the Hearing: G. O. Jones, and others, for the Union
B. Bowlby, and others, for the Employer

Hearing: April 11, 1984

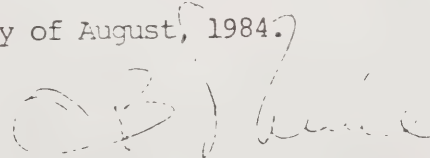
DECISION

Having regard to the evidence and to the submissions of the parties, the Tribunal determines that Mr. R. Romain, a security officer at the respondent's offices at 2 Bloor Street East, is an employee within the meaning of the Act. The Tribunal further determines that Mr. Romain has duties and responsibilities which place him in an apparent conflict of interest with respect to other employees. The Tribunal is of the view that Mr. Romain's duties and responsibilities constitute exceptional circumstances to the extent that it is the Tribunal's opinion that Mr. Romain should not be included in the bargaining unit and, accordingly, he is hereby excluded pursuant to section 1(1)(viii) of the Crown Employees Collective Bargaining Act.

Our determination in this regard does not preclude Mr. Romain as an employee from being represented by a separate employee organization composed of security officers.

The Tribunal further determines that Mr. D.A. Hogg and Mr. C. Grenon, Safety Security Officers (Regional Office), are employees within the meaning of the Act. Their duties and responsibilities are qualitatively and quantitatively different from Mr. Romain's and the Tribunal determines that these employees should be included in the bargaining unit.

DATED at Toronto, Ontario, this 9th day of August, 1984.



O.B. Shime, Q.C., Chairman
for the Tribunal

